No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

EXXON CORPORATION, THE BF GOODRICH COMPANY, UNION CARBIDE CORPORATION, AND MONSANTO COMPANY,
Petitioners,

v.

SUSAN B. BOYLE, ADMINISTRATOR OF THE NEW JERSEY SPILL COMPENSATION FUND, *et al.*,
Respondents.

Petition For A Writ Of Certiorari To The Appellate Division Of The New Jersey Superior Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Exxon Corp. v. Hunt,* 475 U.S. 355, 376 (1986), this Court held that a New Jersey tax was expressly preempted by a Federal statute and remanded the case for a determination "whether, or to what extent, the non-preempted provisions of the statute are severable from the preempted provisions." The New Jersey courts nonetheless denied petitioners any refund by construing this Court's decision in *Hunt* as declaring that Federal law preempted expenditures, rather than taxes, and by exercising equitable discretion to avoid a refund, which they labelled a "remedy of last resort."

The question thus presented is whether the New Jersey courts have violated this Court's mandate in *Hunt* by holding that expenditures, rather than taxes, were preempted and by ignoring this Court's ruling in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 39-40 (1990), that equitable discretion cannot be invoked to deny taxpayers a refund where, as here, a tax "was beyond the State's power to impose?"

PARTIES TO THE PROCEEDING

The petitioners are named in the caption.*/

The respondents are Susan B. Boyle, successor in office to Robert Hunt as Administrator of the New Jersey Spill Compensation Fund; Samuel F. Crane, successor in office to Clifford A. Goldman as Treasurer of the State of New Jersey; Leslie A. Thompson, successor in office to Sidney Glaser as Director of the Division of Taxation; Jeanne M. Fox, successor in office to Jerry F. English as Commissioner of Environmental Protection; and the State of New Jersey.

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*/ Pursuant to Rule 29.1, all parent companies and subsidiaries (except wholly owned subsidiaries) of petitioners are listed in the Appendix at pages 74a-88a.

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SUSAN B. BOYLE, ADMINISTRATOR OF THE NEW JERSEY SPILL COMPENSATION FUND, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE NEW JERSEY SUPERIOR COURT

Petitioners seek a writ of certiorari to review and summarily reverse the decision of the Appellate Division of the Superior Court of New Jersey in *Exxon Corp.* v. *Hunt*, 620 A.2d 1068 (N.J. Super. A.D. 1993), *certification denied*, No. C-920 (N.J. May 27, 1993).

OPINIONS BELOW

The December 2, 1987 opinion of the Supreme Court of New Jersey (App., 15a-38a) on remand from this Court is reported at 534 A.2d 1 (N.J. 1987). The October 24, 1986 Recommendation of the Tax Court of New Jersey to the New Jersey Supreme Court (App., 39a-69a) is not reported.

The February 22, 1993 opinion of the Appellate Division of the New Jersey Superior Court (App., 2a-7a) is reported at 620 A.2d 1068 (N.J. Super. A.D. 1993), *certification denied*, No. C-920 (N.J. May 27, 1993) (App., 1a). The June 28, 1991 Memorandum Opinion of the Tax Court of New Jersey (App., 10a-14a) is not reported.

JURISDICTION

On December 2, 1987, the New Jersey Supreme Court, acting on the mandate from this Court in *Exxon* v. *Hunt*, 475 U.S. 355 (1986), remanded this case to the New Jersey Tax Court. On February 2, 1993, the Appellate Division of the New Jersey Superior Court rendered its decision reviewing the New Jersey Tax Court's June 28, 1991 decision. The New Jersey Supreme Court denied discretionary certification and thereby declined to review the Appellate Division's decision in an order that was filed on May 27, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1988).

STATUTORY PROVISION INVOLVED

Section 114(c) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9614(c) (1985), provided:

> Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay

> compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter. Nothing in this Section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which affects such State.[1/]

STATEMENT

This suit began in 1981 when petitioners filed an action in the New Jersey Tax Court seeking a refund of taxes imposed under the 1977 New Jersey Spill Compensation and Control Act (Spill Act), N.J. Stat. §§ 58:10-23.11, *et seq.* Like many states, New Jersey provides no pre-deprivation hearing with regard to a disputed tax. Taxpayers must instead pay the tax and then seek a refund from the New Jersey Tax Court. N.J.S. 54:49-14.[2/]

Petitioners complained that the taxes which created a fund under the Spill Act were pre-empted by Section 114(c) of

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[1/] On October 17, 1986, Section 114(c) was revised by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. 99-499 § 114, 100 Stat. 1652 (1986). SARA did not contain a tax pre-emption provision.

[2/] Petitioners' efforts to obtain a refund in the New Jersey courts for taxes unlawfully imposed under the Spill Act were preceded by their unsuccessful effort to obtain an injunction in federal court that would have provided them with at least a partial pre-deprivation remedy. *See Exxon Corp.* v. *Hunt*, 683 F.2d 69 (3d Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983) (holding that petitioners' federal court action was barred by the Tax Injunction Act, 28 U.S.C. § 1341).

CERCLA, 42 U.S.C. § 9614(c), because the principal purpose of the fund, which pre-dated CERCLA by three years, was to pay costs, damages or claims that had become eligible for compensation under CERCLA. The Tax Court ruled against petitioners, holding that CERCLA did not pre-empt the exaction of a state tax used to create funds whose purpose was to pay costs, damages or claims eligible for CERCLA compensation, but instead merely prevented the expenditure of the monies raised by such taxes for paying cleanup expenses that were later actually paid by the "Superfund" established by CERCLA. Its decision was affirmed both by the Appellate Division of the Superior Court and the Supreme Court of New Jersey.[3/]

This Court overturned the New Jersey courts' construction of CERCLA. *Exxon Corp. v. Hunt*, 475 U.S. 355 (1986). Recognizing that "[t]his is an express pre-emption case," this Court agreed with petitioners that "the New Jersey courts have violated the plain meaning of the statute." *Id.* at 362, 370. After determining that New Jersey had imposed a tax to create a fund whose purpose was to pay for two types of claims eligible for compensation under CERCLA,[4/] the Court ruled that New Jersey's exaction of the Spill Fund tax was pre-empted to the extent that its purpose was to pay for these expenses. *Id.* at 376. The Court specifically rejected New Jersey's argument that its tax was lawful because the expenditures actually made from the Spill Fund were not pre-empted:

> New Jersey argues, finally, that after the enactment of CERCLA, . . . all Spill Fund

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[3/] 97 N.J. 526, 481 A.2d 271; 190 N.J. Super. 131; 4 N.J. Tax 294.

[4/] The Court held that Spill Fund claims for governmental cleanup of hazardous waste sites and reimbursement of third parties for cleanup costs "are within the scope of CERCLA, except to the extent that they are intended to provide the 10% state share of remedial costs." 475 U.S. at 375-76.

> expenditures for [CERCLA purposes] have been for non-Superfund eligible sites, and therefore are for non-pre-empted purposes. *To the extent that the Spill Act permits taxation to support pre-empted expenditures, however, it cannot stand.*

Id. (emphasis added).[5/]

Thus making it clear that the appropriate inquiry was whether the imposition of the Spill Act tax was for an improper purpose, not how New Jersey later expended moneys from the Spill Fund, this Court held that the New Jersey tax was pre-empted. It remanded for a determination whether any portion of the tax could be saved: the New Jersey courts were directed to consider "whether, or to what extent, the non-pre-empted provisions of the statute are severable from the pre-empted provisions." 475 U.S. at 376.

The New Jersey Supreme Court sent the matter back to the Tax Court to develop a record and to make recommended findings. App., 70a. That court determined, in direct response to this Court's mandate, that the tax itself could not be severed and that a refund of the entire Spill Fund tax would be appropriate if this Court had declared that the collection of the tax was pre-empted. App., 57a, 65a. However, the Tax Court embraced the very premise which this Court had rejected — that "it was not the collection of the Spill Act tax that the [United States Supreme] Court found

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[5/] The premise of the state's argument was also factually erroneous. At the time of this Court's decision, only a *de minimis* proportion of Spill Fund expenditures had been devoted to costs, damages or claims that were not eligible for compensation under CERCLA. *See* Appellants' opening brief in *Exxon Corp. v. Hunt*, No. 84-978, at 22-23 n.24, 25 n.26. This pattern continued following this Court's decision -- the record before the Tax Court on remand showed that 89% of the $49.5 million spent by New Jersey on cleanup was devoted to sites eligible for Superfund compensation. *See* Appendix in Support of Plaintiffs' Motion for Summary Judgment, Schedule IV.

to be improper but rather certain expenditures made from the Fund." App., 50a.[6/] The Tax Court accordingly ruled that petitioners would be entitled to a refund, only if the State had expended monies from the Spill Fund on sites eligible for compensation under CERCLA.[7/]

Also reflecting its view that expenditures, rather than taxes, were pre-empted, the Tax Court held that "the [State] Legislature should be permitted a reasonable period of time to reimburse the Spill Fund for the amount of pre-empted expenditures made." App., 66a. Such reimbursement, the Tax Court concluded, "will make plaintiffs whole because the constitutional infirmity and plaintiffs' financial harm resulted from the improper *expenditure* of Spill Fund revenues and not the *collection* of the tax per se." *Id.* (emphasis in original).

[6/] In embracing this false premise — the linchpin of its holding — the Tax Court attributed language to this Court that is nowhere to be found in *Hunt* and is wholly inconsistent with the Court's analysis:

> The United States Supreme Court . . . held that, "the State was entitled to *collect taxes*," . . . but that, "the State was not permitted to *spend* that money for any of the types of projects which EPA intended to finance," with superfund. Quite simply put, it was the nature of certain expenditures and not the tax collected to fund *all* the expenditures . . . that the Court found to be objectionable.

App., 59a (emphasis and quotation marks in original). *See also* App., 67a ("the harm which plaintiffs . . . allegedly suffered is the improper expenditure of legal tax monies").

[7/] Consistent with this approach, the Tax Court also held that state expenditures were pre-empted, only if made after the June 16, 1982, promulgation of the National Contingency Plan (NCP) or, where applicable, the September 8, 1983, promulgation of the National Priority List (NPL) identifying sites in New Jersey and elsewhere qualifying for CERCLA reimbursement of clean-up costs. App., 68a. The Tax Court adopted its own date for pre-emption even though it acknowledged in its opinion: "Congress, in § 152 of CERCLA expressly stated that § 114(c) would become effective on passage, (in contrast with the predecessor version in H.R. 85 which had a 180 day delay in its preemption provision)." App., 49a.

The New Jersey Supreme Court adopted these recommendations of the Tax Court. App., 38a. It too held that Section 114(c) of CERCLA pre-empted only expenditures from the Spill Fund, not the collection of the tax. App., 21a-26a, 33a, 37a-38a. The state Supreme Court thus concluded that the provisions of the Spill Act allowing "pre-empted" expenditures could be severed from those that allowed other expenditures. App., 21a-26a.[8/]

Invoking its purported equitable discretion, the state Supreme Court said that it would treat a tax refund as a "remedy of last resort." App., 37a. On the assumption that this Court in *Hunt* held that Section 114(c) pre-empted expenditures from the Spill Fund, rather than taxes exacted for an improper purpose, the court held that petitioners would receive no refund if the Legislature "reimburse[s] the Spill Fund for the amount of expenditures found to be pre-empted." App., 38a. In reaching this result, the court relied on neither an analysis of CERCLA nor this Court's opinion in *Hunt*. Instead, it stated that it was "obliged to consider" the repeal of Section 114(c), effective October 17, 1986, in the Superfund Amendments and Reauthorization Act of 1986 (SARA), App., 33a, and it crafted a remedy which it asserted "best implements the intent of Congress" when it repealed pre-emption under CERCLA, App., 37a.[9/] The New Jersey

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[8/] The court also held, like the Tax Court, that pre-emption did not begin on the effective date of Section 114(c), but instead on the dates related to publication of the NCP and NPL. App., 28a-29a. It thereby declined to accord any pre-emptive effect to Section 114(c) for approximately three out of the five years that the provision was in effect. App., 31a.

[9/] The Court also relied on an affidavit of the Deputy Commissioner of the DEP that the expected needs of the Spill Fund for non-pre-empted purposes are substantially higher than anticipated revenue. App., 25a. Despite this prediction, the coffers in the Fund had swollen to more than $84 million as of June 30, 1991. State of New Jersey, Department of Environmental Protection and Energy, Spill Compensation Fund, Annual Report for Fiscal Years 1990 and 1991.

Supreme Court again remanded the case to the Tax Court for a hearing on the amount of "pre-empted" expenditures made from the Spill Fund so that the Legislature could have the opportunity to reimburse the fund.

In February 1988, petitioners filed for a writ of mandamus in this Court, *In re Exxon Corp., et al.*, No. 87-1296, contending that the New Jersey courts had misread this Court's mandate in *Hunt* by focusing on improper expenditures from the Spill Fund, rather than the imposition of a pre-empted tax. The State opposed the petition. Its primary argument was that the review sought was "interlocutory in nature and thus inconsistent with the final judgment rule" because the New Jersey Tax Court had not quantified the "pre-empted expenditures" and the New Jersey legislature had not yet determined whether to reimburse the Spill Fund. Brief in Opposition, *In re Exxon Corp., et al.*, No. 87-1296, at 11-14. On March 28, 1988, this Court denied the mandamus petition. 485 U.S. 975.

The case returned to the New Jersey Tax Court, where the parties agreed that $8,147,094.07 million had been expended for pre-empted purposes after the 1982/1983 promulgation of the NCP and NPL. The path was thus cleared for the New Jersey Legislature to "reimburse" the fund for this amount and destroy petitioners' rights to a refund. On December 16, 1992, during the pendency of petitioners' appeal to the Appellate Division of the New Jersey Superior Court, the Attorney General of New Jersey informed petitioners that the New Jersey Legislature had taken such action by "transfer[ring] $8,142,094 . . . into the [Spill Fund], in satisfaction of the obligations imposed by the remedy devised by the New Jersey Supreme Court's decision in *Exxon Corp.* v. *Hunt*, 109 N.J. 110 (1987)." App., 8a.

On February 22, 1993, the Appellate Division affirmed the Tax Court's judgment and denied petitioners' claims for a refund. In doing so, the Appellate Division rejected

petitioners' arguments based on *McKesson* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). The court read *McKesson* as holding that "if a workable means for curing the pre-emption impairment of the Spill Fund Tax short of a refund is employed, then the plaintiffs' constitutional right to an effective remedy will not have been violated." App., 5a. The court concluded that petitioners "can have no enforceable claim to a refund of any portion of the funds as long as all Spill Fund revenues expended for pre-empted purposes during the period of pre-emption are returned to the Fund from general revenues within a reasonable period of time." App., 6a-7a.

On May 27, 1993, the New Jersey Supreme Court issued an order declining to review the Appellate Division's decision. App., 1a.

REASONS FOR GRANTING THE PETITION

This petition involves the culmination of a 13-year pattern of recalcitrance on the part of the State of New Jersey concerning the pre-emptive effect of Section 114(c) of CERCLA. When that statute was enacted in 1980, New Jersey declared that it would ignore Section 114(c) and persist in collecting the tax until "a final determination by the courts is to the contrary."[10/] New Jersey was the *only* state that continued to collect a tax of this nature after the effective date of Section 114(c).[11/] When the issue reached the New Jersey courts, they originally held that Section 114(c) did not pre-empt the Spill Act tax, but instead pre-empted only certain categories of expenditures from the Spill Fund. This Court reversed that judgment, stating that "the New Jersey

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[10/] [1 N.J.] St. Tax Rep. (CCH) ¶ 34-180.75 (1981).

[11/] *See* Appellants' reply brief in *Exxon Corp.* v. *Hunt*, No., 84-978, at 18-19.

courts have violated the plain meaning of the statute." 475 U.S. at 362, 370.

On remand, the New Jersey courts, at the urging of the State Attorney General, have refused to heed the mandate in *Hunt* and have denied petitioners any refund of the pre-empted tax through reliance on the premise, expressly rejected in *Hunt*, that CERCLA pre-empted expenditures from the fund rather than the exaction of taxes. In addition, the New Jersey courts have ignored this Court's ruling in *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), which *precludes* the New Jersey courts' exercise of equitable discretion in circumstances, like these, involving a pre-empted tax. This petition should be granted to ensure the integrity of the mandate in *Hunt* and respect for this Court's decisions.[12/]

1. Section 114(c) of CERCLA provided that "*no person may be required to contribute* to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter." The Spill Fund clearly had such a

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[12/] Mandamus is a traditional remedy where the lower court's decision on remand is "based upon a misunderstanding of the mandate, and in practical, though unintentional, disobedience of the command thereof that further proceedings be had in conformity with the opinion of this court." *In re Potts*, 166 U.S. 263, 268 (1897). *See also Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 428 (1978) (per curiam); *General Atomic Co. v. Felter*, 436 U.S. 493 (1978) (per curiam); *Will v. United States*, 389 U.S. 90, 95-96 (1967); *United States v. Haley*, 371 U.S. 18 (1962).

In recent years, however, this Court has reviewed failures to comply with the Court's mandate via the writ of certiorari. *See, e.g., Yates v. Aiken*, 484 U.S. 211, 214 (1988) ("We granted certiorari because we were concerned that the South Carolina Supreme Court had not fully complied with our mandate."); *Sumner v. Mata*, 455 U.S. 591 (1982) (granting petition for writ of certiorari to review failure to comply with Supreme Court's remand instructions). Because petitioners can obtain adequate relief from a writ of certiorari, they have not filed a petition for a writ of mandamus. *See* Sup. Ct. R. 20.1 (writ of mandamus available only if "adequate relief cannot be obtained in any other form . . .").

purpose during all of the years that Section 114(c) was in effect. As the New Jersey Supreme Court acknowledged on remand: "The purpose of the Spill Act, enacted in 1977, was to finance prevention and cleanup of oil spills and hazardous substance discharges . . . ." App., 18a. The lower court conceded that the State "levied an excise tax on major chemical and petroleum facilities within the state . . . to implement the legislative goals." *Id.*

In *Hunt* this Court interpreted Section 114(c), in accord with its plain meaning, as pre-empting a tax with such purposes:

> To the extent [the New Jersey Supreme Court] held that the Spill Act could constitutionally *impose a tax* to support expenditures for purposes that we have identified as pre-empted, its judgment is reversed . . . .

475 U.S. at 376 (emphasis added). The Court's remand instructions were as follows:

> We leave to the New Jersey Supreme Court the state-law question whether, or to what extent, the non-pre-empted provisions of the statute are severable from the pre-empted provisions. See *Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 196-97 (1983).

Id.[13/]

[13/] The Court also made clear that it did not expect the New Jersey courts on remand to sustain the entire tax:

> We decline the dissent's invitation to hold that the Spill Act is valid in its entirety because a substantial portion of its purposes are permissible. Such a

(continued...)

The issue before the New Jersey courts on remand was therefore clear-cut: Could the pre-empted purposes of the tax be severed from its non-pre-empted purposes? If not, petitioners would be entitled to a refund of all taxes paid.

Petitioners argued on remand that there could be no such severance because the legislature had imposed a single, non-severable tax that supported both pre-empted and non-pre-empted purposes. *The New Jersey Tax Court agreed*:

> To the extent that the Spill Act contains a single tax that cannot be apportioned between its pre-empted and non-pre-empted purposes, [petitioners] are correct.
>
> * * *
>
> [H]ad the [United States Supreme Court in *Hunt*] found that it was the *collection* of the tax that was improper, this Court should direct repayment of the taxes to the taxpayers in the same proportion as the taxes were paid.

App., 57a, 65a (emphasis in original). *See also*, App. 59a ("[T]he tax cannot be apportioned . . . ."). The State Supreme Court did not disturb this analysis. App., 21a, 38a.[14/] Accordingly, under this Court's mandate, the lower

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[13/](...continued)
holding would be an open invitation to the States to flout federal law by including valid provisions within clearly invalid statutes.

475 U.S. at 375.

[14/] The State Supreme Court, like the Tax Court, acknowledged petitioners' argument that the New Jersey Constitution prohibited the New Jersey courts from recomputing a new, lower tax rate for the Spill Fund (continued...)

courts should have ordered a refund to taxpayers of all of the taxes they had paid during the years that Section 114(c) was in effect.

However, the New Jersey courts avoided this conclusion by embracing the very premise that this Court had rejected in *Hunt*, namely, that "it was not the collection of the Spill Act tax that the [United States Supreme] Court found to be improper, but rather certain expenditures made from the fund." App., 50a; *see also* App., 33a, 38a.[15/] From this premise the New Jersey courts concluded that the pre-emption proscribed in *Hunt* could be remedied by inviting the legislature to replenish improper expenditures from the fund, instead of refunding unlawfully exacted taxes to petitioners.[16/]

The New Jersey courts' crucial premise on remand — that *Hunt* held that Section 114(c) pre-empted only *expenditures* from the fund for an impermissible purpose and not the *imposition* of the tax for an impermissible purpose — is flatly contrary to the plain language of both Section 114(c) and to this Court's decision in *Hunt*. Section 114(c) prohibits a state from requiring a person "*to contribute* to any fund"

[14/](...continued)
sufficient for the fund's non-pre-empted purposes. *See* App., 22a, 57a.

[15/] This erroneous premise also infected the New Jersey Appellate Division's subsequent opinion, *see, e.g.*, App., 5a-7a ("The tax itself has not been held invalid for any reason. . . . [T]he plaintiffs can have no enforceable claim to a refund of any portion of the funds as long as all Spill Fund revenues expended for pre-empted purposes during the period of pre-emption are returned to the Fund . . . .")

[16/] The same mistaken premise also led the New Jersey courts into error about the dates of pre-emption under Section 114(c): As the New Jersey Supreme Court declared, "the NCP and the NPL marked the critical dates on which preemption of remedial or removal *expenditures*, respectively, shall be deemed to have commenced." App., 28a (emphasis added). See also, App., 50a, where the New Jersey Tax Court recited the same rationale to justify postponement of the effective date of pre-emption.

that has certain purposes — *i.e.* taxation to support a fund designed by the legislature to serve purposes addressed by CERCLA. The subsequent expenditure of moneys from a fund by administrators does not affect the tax's pre-empted purpose.

Hunt not only embraced this analysis, but it also expressly rejected the very line of reasoning adopted by the New Jersey courts on remand.[17] New Jersey argued before this Court that no refund was required because "all Spill Fund expenditures" have been "for non-pre-empted purposes." 475 U.S. at 376. This Court disagreed: "To the extent that the Spill Act permits *taxation to support* pre-empted expenditures, however, it cannot stand." *Id.* (emphasis added.) Further emphasizing that Section 114(c) pre-empted the imposition of taxes for certain kinds of funds, rather than the expenditure of moneys from such funds, this Court stated that

> [Section 114(c)] is meant to forbid the States *to impose taxes* to finance certain types of funds. The issue in this case is whether the New Jersey Spill Fund is, in whole or in part, the type of fund that § 114(c) pre-empts.

Id. at 361 (emphasis added); *see also, e.g., id.* at 362 (question is whether Section 114(c) "forbids state taxation of the type the Spill Act imposes"). Finally, the Court's statement of its holding makes clear that Section 114(c) pre-empts taxation for an improper purpose rather than

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[17] The State of New Jersey has acknowledged this point. In its brief in opposition before this Court in 1988, the State "agree[d] with petitioners that this Court [in *Hunt*] held that the actual expenditures made by the Spill Fund were irrelevant for the purpose of statutory construction -- that is, deciding what § 114(c) meant . . . ," but argued that "it does not follow from this conclusion that expenditures are irrelevant for the purpose of remedy." Brief in Opposition, *In re Exxon Corp., et al.*, No 87-1296, at 19.

expenditure for an improper purpose: "To the extent [the New Jersey Supreme Court] held that the Spill Act could constitutionally *impose a tax* to support expenditures for purposes that we have identified as pre-empted, its judgment is reversed." *Id.* at 376 (emphasis added).

The matter could not be clearer: Even if no expenditures had been made from the fund for expenditures subsequently within the scope of CERCLA, a tax designed to raise money to support such expenditures was nonetheless pre-empted. Obviously, the lower courts' inquiry into whether the Spill Fund made "pre-empted expenditures" has nothing to do with whether petitioners paid a pre-empted tax. In the context of New Jersey's pattern of obstinate refusal to submit to the plain language of Section 114(c), New Jersey should be ordered in accordance with the mandate of *Hunt* to refund all Spill Fund taxes paid by petitioners.

2. The New Jersey Supreme Court's refusal to refund the Spill Act tax assessed against petitioners cannot be justified by the exercise of its purported "equitable powers." App., 37a.[18/] The only question open on remand was the issue of severability, *i.e.*, whether petitioners were entitled to a total refund or whether some portion of the tax imposed on them could be severed and saved. 475 U.S. at 376-77. The lower court's decision to invoke its equitable discretion to "make the Spill Fund whole" and to treat a tax refund to petitioners as a "remedy of last resort" thus went beyond the mandate in *Hunt*. *See Sibbald* v. *United States*, 37 U.S. (12 Pet.) 488, 492 (1838) (the court below "is bound by the decree [of this Court] . . . [and cannot] give any other or further relief; . . . nor intermeddle with it, further than to

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[18/] This case does not raise an issue regarding the application of Section 114(c) to taxes paid prior to this Court's decision in *Hunt*, because the New Jersey Supreme Court agreed with petitioners that *Hunt* must be given full retroactive effect. App., 27a. *Compare Harper* v. *Virginia Dept. of Taxation*, 113 S. Ct. 2510, 125 L. Ed 2d 74 (1993).

settle so much as has been remanded"); *see also Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 306 (1948).

The court below grounded its "equitable" remedy denying petitioners a refund on a factor — the subsequent repeal of Section 114(c) — that *Hunt* expressly declared to be irrelevant to petitioners' right to a refund. It relied heavily on the legislative history underlying Congress' 1986 decision not to continue to include a tax pre-emption provision in CERCLA. *See* App., 33a-37a. The court stated that it felt "obliged to consider the context in which repeal of the limited pre-emption of the Spill Act occurred," App., 33a, and "constrained to fashion a remedy for the collection of Spill Act taxes during the pre-emption period that least offends the congressional purpose in repealing pre-emption," App., 37a.[19/]

However, this Court recognized when it rendered decision in *Hunt* that Section 114(c) had already expired and that reauthorization legislation was under consideration in Congress, but it concluded that these developments were irrelevant to the State's duty to reimburse petitioners for pre-empted state action during the period in which Section 114(c) was in effect:

> Of course, [petitioners'] claims for a refund of taxes paid through September 30, 1985, are unaffected by the expiration of CERCLA *or by any changes in the law after that date*.

[19/] The New Jersey Supreme Court's determination of the "congressional purpose in repealing pre-emption" was based solely upon the legislative history of the 1986 amendments to CERCLA, including the carefully scripted remarks of Senator Lautenberg of New Jersey. App., 36a. *Compare Conroy* v. *Aniskoff*, 113 S. Ct. 1562, 1567 (1993) (Scalia, J., concurring).

475 U.S. at 362 n.6 (emphasis added); *see generally Greene* v. *United States*, 376 U.S. 149, 160 (1964). The state court ignored this unambiguous directive by relying on the asserted policies that underlay SARA to limit the relief to which petitioners were entitled under CERCLA.

Furthermore, the exercise of *any* equitable discretion by the New Jersey courts in this case is incompatible with this Court's unanimous decision in *McKesson* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). In *McKesson*, Florida's liquor excise tax provided preferential treatment for in-state parties. While holding that this tax violated the Commerce Clause and enjoining future exactions under the tax, the Florida Supreme Court invoked its equitable discretion in refusing to order "a refund of the differences between the disfavored product's tax rate and the favored product's tax rate." *Id.* at 26.

This Court reversed, holding that the Due Process Clause of the Fourteenth Amendment "obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *Id.* at 31. For taxes declared invalid — like those here — because they are "beyond the State's power to impose" or because the taxpayer is "absolutely immune from the tax," the State has "no choice but to 'undo' the unlawful deprivation by refunding the tax previously paid under duress." *Id.* at 39.[20/]

[20/] The crucial passage in *McKesson* reads as follows:

> Had the Florida courts declared the Liquor Tax invalid either because (other than its discriminatory nature) it was beyond the State's power to impose, as was the unapportioned tax in *O'Connor*, or because the taxpayers were absolutely immune from the tax, as were the Indian Tribes in *Ward* and *Carpenter*, no corrective action by the State could cure the invalidity of the tax during the contested tax period. The State would have had no choice but to "undo"

(continued...)

In contrast, "a State found to have imposed an *impermissibly discriminatory tax* retains flexibility" in remedying the violation. *Id.* at 39-40 (emphasis added). It is only in this latter circumstance that the State retains discretion to remedy the discriminatory element of the tax through either (a) a refund of the portion of the imposed tax that exceeded the tax on in-state products, (b) imposition of a retroactive tax on the preferred products, or (c) an appropriate combination of (a) and (b). *Id.* at 40-41. *See also Harper* v. *Virginia Department of Taxation*, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993) (same).[21/]

The New Jersey Supreme Court's exercise of its "equitable powers" to deny petitioners a refund in this case,

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[20/](...continued)

> the unlawful deprivation by refunding the tax previously paid under duress, because allowing the State to 'collect these unlawful taxes by coercive means and not incur any obligation to pay them back . . . would be in contravention of the Fourteenth Amendment.'

496 U.S. at 39 (citations omitted).

[21/] *McKesson* and *Harper* provide further evidence that the New Jersey courts departed from the mandate in *Hunt* by exercising equitable discretion to deny petitioners a remedy. In *McKesson* and *Harper*, both of which involved impermissibly discriminatory taxes for which a flexible remedy was appropriate, this Court expressly stated in the remand instructions that the state court was "free to choose which form of relief it will provide." *McKesson*, 496 U.S. at 51-52; *Harper*, 113 S. Ct. at __, 125 L. Ed. 2d at 89. By contrast, in *Hunt*, which involved a tax "beyond the power of the State to impose," the Court made no reference to the state court's discretion to choose the form of remedy. *See Hunt*, 475 U.S. at 383 (Stevens, J., dissenting) ("the Court should advise the New Jersey courts how they should calculate the partial refund of taxes to which appellants are presumably entitled on remand").

which deals with a tax "beyond the State's power to impose," is inconsistent with *McKesson*.[22/]

CONCLUSION

For the reasons stated above, the petitioners respectfully request that this Court issue a writ of certiorari to reverse the New Jersey courts' clear misapplications of *Hunt* and *McKesson* in denying petitioners a refund of all of the Spill Act taxes which they paid while Section 114(c) was in effect. Summary action would be appropriate in this case, for the pertinent law is ". . . well settled and stable, the facts are not in dispute, and the decision below is clearly in error."

[22/] Even on the New Jersey courts' erroneous premise that *Hunt* held that Section 114(c) invalidates only expenditures from the Fund for an improper purpose, the tax assessed against petitioners to support these expenditures, which totalled more than $8 million, was "beyond the power of the State to impose." Thus, under *McKesson*, the New Jersey courts had no discretion to deny petitioners a refund of their share of the taxes collected for moneys expended for an improper purpose.

Mireles v. Waco, 112 S. Ct. 286, 290 (1991) (Scalia, J., dissenting) (quoting *Schweiker* v. *Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting)).

Respectfully submitted,

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Attorneys for Petitioners

APPENDIX A

SUPREME COURT OF NEW JERSEY
C-920 September Term 1992
36,545

EXXON CORPORATION, et al.,

Plaintiffs-Petitioners,

v.

ON PETITION FOR CERTIFICATION

ROBERT HUNT, et al.,

Defendants,

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendant-Respondent.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-2044-91 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs; and it is further

ORDERED that the appeal in the within matter is dismissed pursuant to R.2:12-9.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 25th day of May, 1993.

/s/
CLERK OF THE SUPREME COURT

Filed May 27, 1993

APPENDIX B

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2044-91T1

EXXON CORPORATION, THE BF GOODRICH COMPANY, UNION CARBIDE CORPORATION, AND MONSANTO COMPANY,

Plaintiffs-Appellants,

v.

ROBERT HUNT, ADMINISTRATOR OF NEW JERSEY SPILL COMPENSATION FUND, CLIFFORD A. GOLDMAN, TREASURER OF THE STATE OF NEW JERSEY, SIDNEY GLASSER, DIRECTOR OF THE DIVISION OF TAXATION, JERRY F. ENGLISH, COMMISSIONER OF ENVIRONMENTAL PROTECTION; AND THE STATE OF NEW JERSEY,

Defendants-Respondents.

Submitted: February 2, 1993 - Decided: FEB 22 1993

Before Judges Muir, Jr. and Kestin.

On appeal from the Tax Court of New Jersey.

Carlin, Maddock, Fay & Carbone, attorneys for appellants (John J. Carlin, Jr. and Donald J. Fay on the brief).

Robert J. Del Tufo, attorney for respondents (Mary C. Jacobson, Deputy Attorney General, of Counsel; Eileen P. Kelly, Deputy Attorney General, on the brief).

The opinion of the court was delivered by

KESTIN, J.A.D.

The procedural history and factual background of this case have been set out in prior opinions of this court, the Tax Court, the New Jersey Supreme Court and the United States Supreme Court. During the remand proceedings ordered by the New Jersey Supreme Court, 109 *N.J.* 110 (1987), plaintiffs moved in the Tax Court for an order mandating a full refund of those Spill Fund taxes which were attributable to purposes held by the United States Supreme Court to have been preempted by the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The statutory provisions upon which the preemption decision were based have since been repealed.

Plaintiffs contended that the recent holding of the United States Supreme Court in *McKesson v. Division of Alcoholic Beverages & Tobacco*, 496 *U.S.* 18, 110 *S. Ct.* 2238, 110 *L. Ed.* 2d 17 (1990), required a modification of the remedy fashioned by the New Jersey Supreme Court at 109 *N.J.* 110, 128-133 (1987), on remand from the United States Supreme Court, 475 *U.S.* 355, 106 *S. Ct.* 1103, 89 *L. Ed.* 2d 364 (1986). The Tax Court judge held, by reason of the "law of the case" rule, *Flanigan v. McFeely*, 20 *N.J.* 414, 420 (1956); *In re Plainfield-Union Water Co.*, 14 *N.J.* 296 (1954), that he was obliged to follow strictly the mandate of the New Jersey Supreme Court in this case and could not modify it in any way. He saw a motion for reconsideration to the New Jersey Supreme Court as the only proper means for dealing with a later decision of the United States Supreme Court which might be interpreted as invalidating the remedial

mechanism developed by the New Jersey Supreme Court to address the limitations imposed by supervening federal law as declared and applied by the United States Supreme Court in this case.

A final order on remand was then entered. It denied plaintiffs' motion and established the preempted expenditures from the New Jersey Spill Fund, as agreed by the parties when calculated according to the guidelines established by the New Jersey Supreme Court, at $8,142,094.07.

Plaintiffs appeal the Tax Court's denial of the relief they sought under the authority of *McKesson*. We need not address the question whether the "law of the case" rule was correctly applied to deny the relief sought by plaintiffs or whether the "time of decision" rule should have been applied instead. *See State Dept. of Envtl. Protect. v. Ventron Corp.*, 94 *N.J.* 473 (1983). We have analyzed *McKesson* and have determined that it does not require the result contended for by plaintiffs. Accordingly, we affirm on the merits.

We are not persuaded that New Jersey's range of choices for bringing itself into compliance with the requirements of supervening federal law should be narrower than those available to Florida in *McKesson*. There, the United States Supreme Court held that optional means were available to the State of Florida to cure a taxing measure found to be invalid because it discriminated against interstate commerce. The State was obliged to provide a taxpayer who had been required to pay a tax before challenging its validity with "meaningful, backward-looking relief to rectify any unconstitutional deprivation", 496 *U.S.* at 31, 110 *S. Ct.* at 2247, 110 *L. Ed.* 2d at 32, but it was not required to refund the invalid tax if it chose other effective means for eliminating the discrimination.

> When a State penalizes taxpayers for failure to remit their taxes in timely fashion, thus requiring them to pay first before obtaining review of the tax's validity, federal due process principles long recognized by our cases require the State's post deprivation procedure to provide a "clear and certain

> remedy" ... for the deprivation of tax moneys in an unconstitutional manner. In this case, Florida may satisfy this obligation through any form of relief, ranging from a refund of the excess taxes paid by petitioner to an offsetting charge to previously favored distributors, that will cure any unconstitutional discrimination against interstate commerce during the contested tax period. The State is free to choose which form of relief it will provide, so long as that relief satisfies the *minimum* federal requirements we have outlined.
>
> *[McKesson v. Division of Alc. Bev., supra*, 496 *U.S.* at 51-52, 110 *S. Ct.* at 2257-58, 110 *L. Ed.* 2d at 45.] [citations omitted]

The logic of *McKesson* as applied to this case is that if a workable means for curing the pre-emption impairment of the Spill Fund tax short of a refund is employed, then the plaintiffs' constitutional right to an effective remedy will not have been violated.

Plaintiffs contend that the infirmities of a tax which has been determined to be invalid by reason of preemption cannot be adequately remedied in any way short of refunding that portion of the tax held to have been preempted. No adequate rationale is offered to support this position other than that it is required by *McKesson*.

Under *McKesson*, a state has a choice of options in remedying a discriminatory tax because, although the tax itself represents a valid exercise of state power, either its incidence or the manner in which it is administered results in disfavored treatment for persons and entities in inter-state commerce as compared to those involved in intrastate commerce. Elimination of the disparity extinguishes the discrimination.

Here too, the State has validly exercised its power to enact the Spill Fund tax. The tax itself has not been held invalid for any reason. The enactment has been found to be overly broad in its scope, however, subsuming objectives

which were, for a time, preempted by federal law. The United States Supreme Court held in this case that CERCLA expressly preempted the Spill Fund from being *used*

> (1) to finance governmental cleanup of hazardous waste sites; [and] (2) to reimburse third parties for cleanup costs ... except to the extent... [of providing] the 10% state share of remedial costs.
>
> [475 *U.S.* at 375-76, 106 *S. Ct.* at 1115, 89 *L. Ed.* 2d at 382.]

Four other purposes of the Spill Fund were expressly held not to have been pre-empted. *Id.*

It is also clear from sources adverted to by the New Jersey Supreme Court, 109 *N.J.* at 128-132, that the various objectives of the Spill Fund legislation are long-range and expensive. The New Jersey Supreme Court in its earlier affirmance, 97 *N.J.* 526, 530 (1984), observed:

> Moreover, Judge Evers alternatively held that even if Spill Fund tax monies could not be collected for general containment and cleanup purposes, "the [S]pill [F]und law nevertheless encompasses many other areas to which such monies could be devoted which are clearly outside the reach of § 114(c) and which may very well be of sufficient magnitude to sustain the [S]pill [F]und tax." [4 *N.J. Tax* at 315]. Thus, the court held that "even if § 114(c) of [Superfund] could be construed to preempt part of [S]pill [Fund, the *** nonpreempted areas are more than sufficient to sustain its continued validity." *Id.* at 320. [alterations in original] [footnotes omitted]

The taxes paid by the plaintiffs and others during the period of pre-emption are presumptively valid as levies to fund those Spill Fund objectives that were determined not to have been preempted by federal law. *See WHYY, Inc. v. Glassboro*, 50 *N.J.* 6, 13 (1967); *East Orange v. Livingston Township*, 102 *N.J. Super.* 512, 531 (Law Div. 1968), *aff'd o.b.*, 54 *N.J.* 906 (1969). Thus, the plaintiffs can have no

enforceable claim to a refund of any portion of the funds as long as all Spill Fund revenues expended for preempted purposes during the period of pre-emption are returned to the Fund from general revenues within a reasonable period of time. The CERCLA prohibition against taxing for specified (pre-empted) purposes will thus have been effectively cured. The amounts expended which represent revenues that were impermissibly applied will have been replaced and made available for uses which are no longer preempted or never were. This conclusion is of a piece with the United States Supreme Court's rationale in *McKesson;* and is precisely the remedy established by the New Jersey Supreme Court, 109 *N.J.* at 128-133, on remand from the United States Supreme Court. There is no reason to apprehend that, measured by the standard of McKesson, the six month period for restoration of the expended funds is unreasonable. No appeal has been taken from the trial court's determination that the amount so expended was $8,142,094.07.

Affirmed.

APPENDIX C

State of New Jersey
Department of Law and Public Safety
Division of Law

(609) 984-5016

December 16, 1992

Donald J. Fay, Esq.
Carlin, Maddock, Fay & Cerbone
30 Vreeland Road, P.O. Box 751
Florham Park, New Jersey 07932

Re: *Exxon Corp., et al. v. Hunt*

Dear Mr. Fay:

Please be advised that the transfer of $8,142,094 into the New Jersey Spill Compensation Fund has been approved by the Joint Budget Oversight Committee of the New Jersey State Legislature, and that that sum has been transferred into the New Jersey Spill Compensation Fund, in satisfaction of the obligations imposed by the remedy devised by the New Jersey Supreme Court's decision in *Exxon Corp. v. Hunt*, 109 *N.J.* 110 (1987).

Very truly yours,

ROBERT J. DEL TUFO
ATTORNEY GENERAL
OF NEW JERSEY

By: */s/*
Eileen P. Kelly
Deputy Attorney General

cc: Susan J. Boyle, Administrator,
New Jersey Spill Compensation Fund

APPENDIX D

SUPREME COURT OF NEW JERSEY
M-1095 September Term 1991
21,567

EXXON CORPORATION, et al.,

Plaintiffs-Movanta,

v.

ROBERT HUNT, ADMINISTRATOR OF NEW JERSEY SPILL COMPENSATION FUND, et al.,

Defendants-Respondents.

This matter having been duly presented to the Court, it is ORDERED that the motion for clarification is granted. Plaintiffs' notice of appeal being from the whole of the October 31, 1991, order of the Tax Court (A-2044-91T1), the six-month period provided by the Court's judgment will begin to run when the appeal process, including any application for certification, is complete or, if plaintiffs move to amend the notice of appeal to limit its scope, from the filing date of an order by the Appellate Division accepting such an amended notice of appeal.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 27th day of April, 1992.

/s/
CLERK OF THE SUPREME COURT

APPENDIX E

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE TAX COURT COMMITTEE ON OPINIONS

EXXON CORPORATION, et al., Plaintiffs, v. ROBERT HUNT, et als., Defendants.	On Remand from the New Jersey Supreme Court A-158 September Term 1986 DOCKET NO's SC 303A-81 SC 319A-81TC **MEMORANDUM OPINION**
EXXON CORPORATION, UNION CARBIDE CORPORATION, THE B.F. GOODRICH COMPANY, TENNECO OIL COMPANY, and MONSANTO COMPANY, Plaintiffs, v. JOHN BALDWIN, DIRECTOR OF THE DIVISION OF TAXATION, Defendant.	TAX COURT OF NEW JERSEY DOCKET NO's SC 088B-83 SC 041B-83 SC 059B-83 SC 039B-83 SC 040B-83 SC 319A-81TC

Decided June 28, 1991

Donald J. Fay for plaintiff; John J. Carlin and Donald J. Fay on the brief (Carlin, Maddock, Fay & Cerbone, attorneys).

Eileen Kelly for defendant
(Robert J. Del Tufo, Attorney General of New Jersey, attorney).

CRABTREE, J.T.C.

Plaintiffs move for summary judgment on their claims for refund of taxes collected pursuant to the Spill Compensation and Control Act, *N.J.S.A.* 58:10-23.11, *et seq.* (the Spill Act).

The purpose of the Spill Act, enacted in 1977, was to finance prevention and cleanup of oil spills and hazardous substance discharges. *N.J.S.A.* 58:10-23.11a. The Act imposed an excise tax on major chemical and petroleum facilities in New Jersey, and the proceeds of the tax have been deposited in a permanent fund (the Spill Fund) to implement the legislative goals. *N.J.S.A.* 58:10-23.11h.

The case is here on remand from the New Jersey Supreme Court to determine the amount of so-called preempted expenditures for specified preemption periods. *Exxon Corp. v. Hunt*, 109 *N.J.* 110 (1987).

Plaintiffs commenced this litigation with an action in the Tax Court seeking a declaration that the Spill Act was invalid as a violation of Article VI, cl. 2 of the United States Constitution (the supremacy clause), specifically that the Spill Act was preempted by section 114(c) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), P.L. 96-510 codified as 42 *U.S.C.* § 9601, *et seq.* (also referred to as the Superfund). The Tax Court upheld the validity of the Spill Act, 4 *N.J. Tax* 294 (Tax Ct. 1982) and the Superior Court, Appellate Division affirmed. 190 *N.J. Super.* 131 (App. Div. 1983). The Appellate Division was affirmed by the New Jersey Supreme Court, 97 *N.J.* 526 (1984).

The United States Supreme Court reversed in part and affirmed in part, holding that the Spill Fund created by the Spill Act was pre-empted by CERCLA to the extent that it could be used (1) to finance governmental cleanup of

hazardous waste sites and (2) to reimburse third parties for cleanup costs. The other four purposes for which the Spill Fund could be used, namely, compensation of third parties for damage resulting from the discharge of hazardous substances, payment of personnel and equipment costs, administration of the fund itself and research, were not covered by CERCLA and thus the Spill Act was not pre-empted to the extent of those four purposes. *Exxon Corp. v. Hunt*, 475 *U.S.* 355, 375, 106 S. Ct. 1103, 1116, 89 *L. Ed.* 2d 364, 382 (1986). The case was remanded to the New Jersey Supreme Court for further proceedings. 475 *U.S.* at 377, 106 *S. Ct.* at 1116-1117, 89 *L. Ed.* 2d at 383.

On remand, the New Jersey Supreme Court remanded to the Tax Court to develop a record and to make recommended findings. Those findings were set forth in an unreported 1986 Tax Court opinion, and our Supreme Court addressed those findings in a 1987 opinion reported in 109 *N.J.* 110. In that opinion the court held (1) the pre-empted provisions of the Spill Act were severable from the non-pre-empted provisions; (2) the pre-emption period for the possible refund of pre-empted expenditures was July 16, 1982 to October 17, 1986 for removal actions and September 8, 1983 to October 17, 1986 for remedial actions; and (3) the legislature is given six months following determination of pre-empted expenditures to reimburse the Spill Fund from non-Spill Act revenues; failing such reimbursement the Fund must refund to plaintiffs, pro rata, so much of the pre-empted expenditures as the Spill Act taxes paid by plaintiffs bears to the total amount of Spill Act taxes collected. 109 *N.J.* at 122-132.

The court thereupon remanded the matter to the Tax Court "for further proceedings consistent with this opinion." *Id.* at 132-133.

Following remand to this court the parties agreed upon the amount of pre-empted expenditures. An order will be entered reflecting that agreement.

Plaintiffs claim that they are entitled to refunds now, without regard to the condition imposed in our Supreme Court's opinion. They contend that, by virtue of a United

States Supreme Court case decided in 1990, subsequent to the 1987 decision of the New Jersey Supreme Court, this court may ignore the latter's mandate and award immediate relief.

This court is not at liberty to ignore the mandate of the New Jersey Supreme Court, notwithstanding that the latter's decision may be contrary to a later United States Supreme Court decision.

It is well settled in this State that, on remand from an Appellate Court "the trial court is under a peremptory duty to obey in the particular case the mandate of the Appellate Court precisely as it is written." *Flanigan v. McFeely*, 20 *N.J.* 414, 420 (1956). This duty to follow the Appellate mandate on remand exists regardless of whether the lower court perceives error in the Appellate Court's decision. As our Supreme Court declared in *re Plainfield-Union Water Co.*, 14 *N.J.* 296 (1954):

> The mandate is a judicial precept that must be enforced as written. Relief from its directions, even though manifestly erroneous, can be had only in the appellate court whose judgment it is... [Citations omitted]. The subordination of the inferior tribunal is of the very essence of the appellate function; the mandate is the process directed to the execution of the appellate judgment, and is therefore a command to be obeyed. The reinvestiture of jurisdiction in the inferior tribunal is in consonance with that judgment, and qualified accordingly. The appellate judgment becomes the law of the case; and the mandate is the direction for conforming judicial action... [Citation omitted]. (14 *N.J.* at 303).

This court's function, therefore, "is a simple one of compliance" with the Supreme Court's direction, even if this court finds the Court's decision to be "manifestly erroneous". *Id.* at 303. The proper means for obtaining the relief plaintiffs seek is by motion for reconsideration to the New Jersey Supreme Court, the tribunal that rendered the decision plaintiffs now wish to modify. *Polidori v. Kordys, Puzio &*

DiTomasso, 228 *N.J. Super.* 387 (App. Div. 1988); 6A Moore's Federal Practice (2 ed. 1987) § 59.16, pp. 59-337 to 338.

The separate actions commenced by these same plaintiffs seeking refunds of Spill Act taxes will not be addressed at this time, as those actions are not part of the remand.

Plaintiffs motion for summary judgment is denied. Defendant will prepare the appropriate order, which will also recite the amount of pre-empted expenditures heretofore agreed upon by the parties. Defendant is also directed to notify the appropriate officers of the New Jersey Legislature of the amount of pre-empted expenditures immediately following entry of the order.

APPENDIX F

SUPREME COURT OF NEW JERSEY
September Term 1986

A-158

EXXON CORPORATION, THE BF GOODRICH COMPANY, UNION CARBIDE CORPORATION, MONSANTO COMPANY and TENNECO CHEMICALS, INC.,

Plaintiffs-Appellants,

v.

ROBERT HUNT, ADMINISTRATOR OF NEW JERSEY SPILL COMPENSATION FUND; CLIFFORD A. GOLDMAN, TREASURER OF THE STATE OF NEW JERSEY; SIDNEY GLASER, DIRECTOR OF THE DIVISION OF TAXATION, and THE STATE OF NEW JERSEY,

Defendants-Respondents.

EXXON CORPORATION, THE BF GOODRICH COMPANY, UNION CARBIDE CORPORATION, MONSANTO COMPANY and TENNECO CHEMICALS, INC.,

Plaintiffs-Appellants,

v.

ROBERT HUNT, ADMINISTRATOR OF NEW JERSEY SPILL COMPENSATION FUND; CLIFFORD A. GOLDMAN, TREASURER OF THE STATE OF NEW JERSEY; SIDNEY GLASER, DIRECTOR OF THE

DIVISION OF TAXATION; JERRY F. ENGLISH, COMMISSIONER OF ENVIRONMENTAL PROTECTION; and THE STATE OF NEW JERSEY,

Defendants-Respondents.

Argued February 17, 1987-Decided December 2, 1987

On remand from the Supreme Court of the United States, whose opinion is reported at 475 *U.S.* 355, 106 *S. Ct.* 1103, 89 *L. Ed.* 2d 364 (1986).

John J. Carlin, Jr., argued the cause for appellants (*Mr. Carlin*, attorney; *Mr. Carlin* and *Donald J. Fay*, on the brief).

Mary R. Hamill, Deputy Attorney General, argued the cause for respondents (*W. Cary Edwards*, Attorney General of New Jersey, attorney; *Deborah T. Poritz*, Assistant Attorney General, of counsel; *Ms. Hamill* and *Nancy B. Stiles*, Deputy Attorney General, on the brief).

The opinion of the Court was delivered by STEIN, J.

This case is before us for the second time. Initially, we affirmed the judgment of the Appellate Division upholding the Tax Court's determination that the tax imposed by the New Jersey Spill Compensation and Control Act, *L.*1976, *c.* 141 (codified as amended at *N.J.S.A.* 58: 10-23.11 to -23.24, -23.34) (Spill Act), was not preempted by the federal government's adoption of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 *U.S.C.A.* §§ 9601-9675) (CERCLA). *Exxon Corp. v. Hunt*, 97 *N.J.* 526 (1984).

The United States Supreme Court, affirming in part and reversing in part, concluded that the tax levied by the Spill

Act was imposed for certain purposes that were preempted by CERCLA, as well as for other purposes not preempted by CERCLA. *Exxon Corp.* v. *Hunt,* 475 *U.S.* 355, 89 *L. Ed.* 2d 364 (1986). Accordingly, the Supreme Court remanded the matter to this Court to determine "the state law question whether, or to what extent, the non-preempted provisions of the statute are severable from the preempted provisions," *id.* at 376, 106 S.Ct. at 1116, 89 *L. Ed. 2d* at 382, "and for further proceedings not inconsistent with this opinion." *Id.* at 377, 106 S.Ct. at 1117, 89 *L. Ed.* 2d at 383.

We then remanded the matter to the Tax Court to develop a record and to make recommended findings, otherwise retaining jurisdiction. ———— *N.J.* ———— (1986). Pursuant to our order, the Tax Court has submitted the following recommended findings:

1. The decision of the United States Supreme Court should not be applied prospectively but should be retroactive to July 16, 1982 with respect to expenditures made on preempted removal purposes and to September 8, 1983 as to preempted remedial expenses.

2. The non-preempted purposes of the Spill Act are severable from the purposes found to be preempted by the United States Supreme Court.

3. Plaintiffs' claims for refunds should not be defeated by reason of their failure to comply with the procedural requirements of *N.J.S.A.* 54:49-14.

4. Following an accounting, (and plenary hearing if necessary) to determine the amount of monies paid for material purchased and services rendered for preempted removal purposes on or after July 16, 1982 and for preempted remedial purposes on or after September 8, 1983 to March 10, 1986, (date of the United States Supreme Court decision), the Legislature should be permitted a reasonable period of time to reimburse the fund for the preempted amounts expended.

(a) If, following such reimbursement, the amount of the fund exceeds the cap established by the Legislature, such excess should be paid to plaintiffs.

(b) Should the required reimbursement not be made, the amount of preempted expenditures should be refunded to plaintiffs.

(c) Such refunds should be made in proportion to the tax paid by each plaintiff to the total tax collected.

5. Defendants should not be enjoined from enforcing payment of the spill fund tax by plaintiffs.

[———— *N.J. Tax* ————, ———— (Tax Ct. 1986) slip op. at 38, 39.]

We now modify and, as modified, adopt the recommended findings of the Tax Court.

I

The procedural history and facts pertinent to the preemption issue are set forth in the prior opinions of this Court and the United States Supreme Court. They need be restated here only to the extent necessary to frame the unique issue that confronts us in respect of the Supreme Court's remand.

The purpose of the Spill Act, enacted in 1977, was to finance prevention and cleanup of oil spills and hazardous substance discharges because of their adverse effects on the state's environment and economy. *N.J.S.A.* 58:10-23.11a. The Act levied an excise tax on major chemical and petroleum facilities within the state, and the proceeds of the tax have been deposited into a permanent fund (Spill Fund) to implement the legislative goals. *N.J.S.A.* 58:10-23.11h. The Spill Fund may be expended primarily to clean up discharges of hazardous substances, to compensate third parties from economic losses resulting from such discharges, and for research and administrative costs. *N.J.S.A.* 58:10-23.11o. Tax collections during Spill Fund fiscal years from 1978

through 1985 averaged slightly less than 10 million dollars annually.

Congress enacted CERCLA in 1980, providing for the establishment over a five-year period of a 1.6 billion dollar trust fund, commonly known as Superfund. 87.5% of Superfund was raised primarily by federal excise taxes on petroleum and chemicals,[1/] and the balance by appropriations from general revenues. Superfund's resources may be expended for two primary purposes: the first, "governmental response," encompasses both "removals" of released hazardous substances in the nature of a "short term" cleanup, 42 *U.S.C.A.* § 9601 (23), and "remedial action," to achieve a "permanent remedy" for released hazardous substances. 42 *U.S.C.A.* § 9601 (24). Secondly, Superfund may pay claims, consisting either of reimbursement to private parties for hazardous substance cleanup costs consistent with the national contingency plan, or reimbursement to the federal or a state government to compensate for damages to natural resources. 42 *U.S.C.A.* §§ 9611(a) (2)-(3). Unlike Spill Fund, Superfund resources cannot be used to clean up oil spills or to compensate third parties for economic losses caused by hazardous substance discharges.

The pre-emption issue that was resolved by the Supreme Court's decision concerned the proper interpretation of § 114(c) of CERCLA, 42 *U.S.C.A.* § 9614 (c). That section, since repealed in its entirety by § 14 (a) of the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. 99-499, 100 Stat. 1652 (codified at 42 *U.S.C.A.* § 9614 (c)), provided as follows:

[1/] The federal excise tax on petroleum is currently at the rate of 0.79 cent a barrel and on chemicals at rates ranging from 0.22 cent to $4.87 per ton. 26 *U.S.C.A.* § 4611. Under the Spill Act, as originally enacted, the basic tax rate was .01 cent per barrel on petroleum products, and on non-petroleum products the greater of .01 cent per barrel or .4% of fair market value. *L.* 1976, *c.* 141, § 9. As amended by *L.* 1986, *c.* 143, § 2, the tax rate is .0125 cent per barrel on petroleum products, and on nonpetroleum products the greater of .0125 cent per barrel or .1% of fair market value. *N.J.S.A.* 58:10-23.11h.

> Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter. Nothing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which affects such State.

The New Jersey Attorney General's contention was that the preemption language should be construed to prohibit only payments to a fund to be used for purposes that are actually compensated by Superfund. The Supreme Court rejected that construction and concluded that § 114(c) preempted "any fund intended, in whole or in part, to pay for the same types of expenses that may be paid by Superfund," 475 *U.S.* at 370, 106 S.Ct. at 1113, 89 *L. Ed.* 2d at 379, whether or not Superfund actually paid such expenses.

With respect to the parameters of preemption the Court's opinion implicitly acknowledged that CERCLA itself does not set forth criteria for determining which removal and remedial expenses and which natural resource claims "may be compensated" by Superfund. Accordingly, since such criteria are set forth in the National Contingency Plan (NCP) required by CERCLA to be revised to reflect its provisions, 42 *U.S.C.A.* § 9605 (8)(B), the Court held that "the NCP provides the appropriate measure of whether a given expenditure constitutes 'costs of response or damages or claims which may be compensated' by Superfund." 475 *U.S.* at 375, 106 S.Ct. at 1116, 89 *L. Ed.* 2d at 382.

The Court conceded that CERCLA did not preempt expenditures authorized by the Spill Act for the following purposes: to compensate third parties for damage resulting from hazardous substance discharges; to pay personnel and equipment costs; to administer the fund itself; and to conduct

research. *Id.* at 375, 89 *L. Ed.* 2d at 382. In addition, the Court specifically excluded the required State contribution to the cost of remedial actions, 42 *U.S.C.A.* § 9604(c)(3)(C), from those costs that "may be compensated" by Superfund.

The Court concluded that the Spill Act was preempted by § 114(c) of CERCLA to the extent that the Act authorized expenditures, beyond the mandatory state share, "for remedial costs for sites on the National Priority List, or for removal costs that are eligible for Superfund compensation under the terms of the NCP." 475 *U.S.* at 376, 106 S.Ct. at 1116, 89 *L. Ed.* 2d at 382.

II

Recommendations of the Tax Court

No testimony was elicited in the course of the remand proceedings before the Tax Court. As a result, the record on remand consists solely of affidavits and exhibits submitted by the parties in support of various motions filed with the Court.

(a) *Severability*

We are in full accord with the Tax Court's conclusion that the purposes of the Spill Act held to be preempted may be severed from the remainder of the statute without impairing its validity.

The critical standard for determining issues of severability is the presumed intent of the Legislature. "That intent must be determined on the basis of whether the objectionable feature of the statute can be excised without substantial impairment of the principal objects of the statute." *Affiliated Distillers Brands Corp. v. Sills*, 60 *N.J.* 342, 345 (1972); *accord New Jersey Chapter, Am. Inst. of Planners v. New Jersey State Bd. of Prof. Planners*, 48 *N.J.* 581, 593, *cert. denied*, 389 *U.S.* 8, 19 *L. Ed.* 2d 8 (1967); *Lane Distributors, Inc. v. Tilton*, 7 *N.J.* 349, 369-70 (1951); 2 *Sutherland, Statutory Construction* § 44.03 *(C. Sands 4th ed. 1986)*, at 483. As we explained in *State v. Lanza*, 27 *N.J.* 516 (1958),

> [A]n unconstitutional provision in a statute does not affect the validity of a separate article or clause of the enactment, if otherwise valid, unless the two are so intimately connected and mutually dependent as reasonably to sustain the hypothesis that the Legislature would not have adopted the one without the other. Where the principal object of the statute is constitutional, and the objectionable provision can be excised without substantial impairment of the general purpose, the statute is operative except insofar as it may contravene fundamental law. [*Id.* at 528.]

In this unusual setting, the inquiry is whether the Legislature would have intended the nonpreempted portions of the Spill Act, including the tax rate, to remain in effect notwithstanding the determination that significant statutory purposes were preempted by CERCLA *for a limited period.* (*See* discussion as to the period of pre-emption, *infra* at ——— (slip op. at 14-23)). Plaintiffs argued in the Tax Court and before us that severability is inappropriate where, as here, a single tax rate was struck by the Legislature to fund both preempted and nonpreempted purposes. We are not persuaded, however, that the valid purposes of a taxing statute are not severable from the invalid ones simply because all of the statutory objectives are financed by the same tax. Rather, the entire statutory scheme must be analyzed in order to ascertain the probable intent of the Legislature as to severability. The guiding principle was succinctly stated by Judge Gibbons in *Chamber of Commerce v. Hughey,* 774 *F.*2d 587, 597 (3d Cir. 1985): "This [severability] is largely a question of whether the statute will continue to make sense after the challenged portion is excised."

We observe initially that the Spill Act contains a standard severability clause. *N.J.S.A.* 58:10-23.11w. However, the inclusion or exclusion of such a clause does not ordinarily resolve the issue. *See State v. Lanza, supra,* 27 N.J. at 527.

We also note the Legislature's comprehensive objectives in passing the Spill Act:

> The Legislature finds and declares that the discharge of petroleum products and other hazardous substances within or outside the jurisdiction of this State constitutes a threat to the economy and environment of this State. The Legislature intends by the passage of this act to exercise the powers of this State to control the transfer and storage of hazardous substances and to provide liability for damage sustained within this State as a result of any discharge of said substances, by requiring the prompt containment and removal of such pollution and substances, and to provide a fund for swift and adequate compensation to resort businesses and other persons damaged by such discharge. *[N.J.S.A.* 58:10-23.11a.]

To implement these wide-ranging goals, the Act authorizes the Department of Environmental Protection (DEP) to clean up hazardous discharges either by using the resources of the Spill Fund or by directing the discharger to perform the work at its own expense. *N.J.S.A.* 58:10-23.11f. The fund also can be used to reimburse innocent third parties for cleanup and removal costs incurred by them, and to pay direct and indirect damages sustained because of hazardous substance discharges. *N.J.S.A.* 58:10-23.11g. The Act imposes joint and several liability on dischargers of hazardous substances, without regard to fault, for all cleanup and removal costs, *N.J.S.A.* 58:10-23.11g, and authorizes the imposition of treble damages on a discharger who fails to comply with a directive to clean up a hazardous-substance discharge. *N.J.S.A.* 58:10-23.11f-a. The Spill Fund's authorized uses were summarized in the Supreme Court's opinion:

> As we have explained above, the Spill Fund may be used for six purposes: (1) to finance governmental cleanup of hazardous waste sites; (2) to reimburse third parties for cleanup costs; (3) to compensate third parties for damage resulting from hazardous substance discharges; (4) to pay personnel and equipment costs; (5) to administer the fund itself;

> and (6) to conduct research. [475 *U.S.* at 375, 106 S.Ct. at 1116, 89 *L. Ed.* 2d at 382.]

It is also significant that the Legislature, when it adopted the Spill Act, knew that federal funding for hazardous waste cleanup was possible and that such funding might warrant modification of the authorized purposes of the Spill Act. Section 27 of the Act provides:

> If the United States Congress enacts legislation providing compensation for the discharge of petroleum and hazardous products, the commissioner shall determine to what degree that legislation provides the needed protection for our citizens, businesses and environment and shall make the appropriate recommendations to the Legislature for amendments to this act. [*L.* 1976, *c.*141, § 27 (codified at *N.J.S.A.* 58:10-23.11z).]

Also pertinent to the question of severability is the provision in the Spill Act as originally enacted, *L.*1976, *c.*141, § 9, suspending the collection of taxes whenever the Spill Fund attains certain prescribed levels.[2/] Although these

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[2/] In its original form, *N.J.S.A.* 58:10-23.11h provided, in part:

> b. * * * In each fiscal year following any year in which the balance of the fund equals or exceeds $50,000,000.00, no tax shall be levied unless (1) the current balance in the fund is less than $40,000,000.00 or (2) pending claims against the fund exceed 50% of the existing balance of the fund. The provisions of the foregoing notwithstanding, should claims paid from or pending against the fund not exceed $5,000,000.00 within 3 years after the tax is first levied, the tax shall be $0.01 per barrel transferred or 0.4% of the fair market value of the product, as the case may be, until the balance in the fund equals or exceeds $36,000,000.00, and thereafter shall not be levied unless: (1) the current balance in the fund is less than $30,000,000.00 or (2) pending claims against the fund exceed 50% of the existing balance of the fund. In the event of either such occurrence and upon certification thereof by the State Treasurer, the director shall within 10 days of the date of such certification relevy the excise tax, which shall take effect on the first day of the month following such relevy. * * *

tax-suspension provisions of the Act were repealed as of February 1, 1987, *L.*1986, *c.*143, § 2 (codified at *N.J.S.A.* 58:10-23.11h-b), they were in effect during the entire period of preemption. Accordingly, the Spill Act had a self-correcting mechanism that would suspend tax collections when existing funds were adequate to discharge the statutory objectives. These provisions appear to reflect the Legislature's assumption that if the demands on the Spill Fund were less expansive than originally contemplated, the impact of the prescribed tax rate on the oil and chemical industry would be alleviated by the tax-suspension provisions built into the Act. Although undoubtedly not adopted in anticipation of a holding that certain statutory objectives were preempted by CERCLA, the presence of the tax-suspension mechanism persuasively suggests that the tax-rate provisions of the Act are not inconsistent with a determination that the nonpreempted purposes of the Spill Act are severable from the preempted purposes during the limited period of preemption.

We are also informed by the uncontroverted affidavit of Michael E. Catania, Deputy Commissioner of the DEP, filed with the Tax Court in support of the State's motion seeking severability and prospective application of the Supreme Court's decision, that the Spill Fund will require approximately 340 million dollars during the five fiscal years beginning with 1987 to pay for "nonpreempted" type expenditures. Of this amount, 200 million dollars is projected as the cleanup cost for sites ineligible for Superfund reimbursement and 140 million dollars as the anticipated State share of cleanup costs at Superfund-eligible sites. The affidavit also identified anticipated increases in administrative costs and in the cost of reimbursement of third-party claims. The affidavit states that the projected needs of the Spill Fund for nonpreempted purposes are substantially higher than the anticipated revenue from the then current tax rate.

As forecast by the Catania affidavit, the Legislature has recently recognized the enhanced needs of the Spill Fund by increasing the tax rate, and broadening the tax base by redefining "major facility" to include a greater number of oil and chemical companies. *L.* 1986, *c.* 143, § 2 (codified at

N.J.S.A. 58:10-23.11h). The Legislature's commitment of additional resources to the Spill Fund, after the Supreme Court's preemption decision, demonstrates plainly that the Legislature's assumption in 1986 was that the Spill Act remained in effect, notwithstanding the Court's conclusion that a portion of the act's objectives had been preempted for a limited period.[3/]

Accordingly, we are convinced on the basis of the overall structure of the Spill Act, its comprehensive purpose to facilitate the statewide cleanup of hazardous substance discharges, and the continuing commitment of the Legislature to provide adequate resources for the Spill Fund that severability of the non-preempted provision of the Spill Fund, during the limited period of pre-emption, is manifestly consistent with the legislative intent. The Spill Act "makes sense," *Chamber of Commerce v. Hughey, supra,* 774 *F.*2d at 597, with or without the pre-empted purposes.

(b) *Period and Scope of Preemption*

The conclusion that the pre-empted purposes of the Spill Act are severable from the nonpre-empted provisions requires that we determine the period and scope of pre-emption and, based on that determination, the appropriate relief. The positions of the parties conflict sharply. The State argues that the Supreme Court's decision should be given only prospective application, with the result that the period of pre-emption would begin on March 10, 1986 (the date of the Court's decision), and would end on October 17, 1986, the effective date of SARA. If its position on prospectivity is rejected, the State supports the Tax Court's determination that promulgation of the NCP and the NPL mark the commencement period for pre-emption of removal and remedial actions respectively, but the State argues that the

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[3/] *L.* 1986, *c.* 143 was enacted after Congress adopted the Superfund Amendments & Reauthorization Act of 1986, which repealed the preemption provision in CERCLA. 42 *U.S.C.A.* §§ 9614(c). Nevertheless, it is self-evident that the Legislature assumed that the Supreme Court's decision did not invalidate the Spill Act in its entirety.

pre-emption period should end on September 30, 1985, the date on which CERCLA's taxing authority expired.

Plaintiff's position is that the effective date of the Supreme Court's holding that the Spill Act was partially preempted by CERCLA must be December 11, 1980, the date of CERCLA's enactment. Plaintiffs point to section 302(a) of CERCLA, 42 *U.S.C.A.* § 9652(a), which states that "unless otherwise provided, all provisions of [CERCLA] shall be effective on December 11, 1980." Moreover, plaintiffs argue that the Supreme Court's references to the NCP and NPL were intended solely to provide a frame of reference for determining *whether* the Spill Act established a fund that was devoted to preempted purposes, but were not intended to imply that the effective date of preemption depended on promulgation of the NCP and NPL. Plaintiffs further contend that on CERCLA's enactment New Jersey had "adequate guidance" to know what sites would be eligible for Superfund reimbursement and "could have amended the Spill Act so as not to violate Section 114(c)."

We are in full accord with the Tax Court's conclusion that the Supreme Court's decision in this case should not be restricted to prospective application. Although the Supreme Court's opinion is silent on the issue of retrospective application, the remand to this Court to determine severability and "for further proceedings" carries with it the implicit direction that we determine the relief appropriate to the holding that the Spill Act is partially preempted. If the Court conceived that its decision might apply only prospectively, which would significantly affect the remedy we must fashion, it is reasonable to assume that the opinion would at least have adverted to that possibility. *See Lemon v. Kurzman,* 411 *U.S.* 192, 198, 199, 30 *L. Ed.* 2d 151, 160 (1973) (*Lemon II*) (holding that there are no absolute principles available to determine whether a given constitutional ruling should be applied retroactively and that equitable principles and the totality of circumstances should guide such determinations); *accord Coons v. American Honda Motor Co.*, 96 *N.J.* 419 (1984) (*Coons II*).

Moreover, we agree with the Tax Court that an indispensable prerequisite to prospectivity is not present in this case, since the Supreme Court's opinion did not "establish a new principle of law, either by overruling clear past precedent on which litigants may have relied * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed * * *." *Chevron Oil Co. v. Huson,* 404 *U.S.* 97, 106, 30 *L. Ed.* 2d 296, 306 (1971) (citations omitted). Here, the Supreme Court relied upon a settled legal principle — the preeminence of federal legislation under the supremacy clause, article VI, clause 2 of the United States Constitution — and applied it by construing section 114(c) of CERCLA as preempting certain provisions of the Spill Act. No "clear past precedent" was overruled nor could the question of statutory interpretation fairly be considered an "issue of first impression whose resolution was not clearly foreshadowed," as that phrase was used in *Chevron.* The purpose of the *Chevron* test is the avoidance of prejudice arising from judicial decisions that interested parties could not fairly have anticipated. In this case the issue of statutory interpretation was susceptible to either of two resolutions, one advanced by the State and the other advanced by plaintiffs. The Court's holding that CERCLA partially preempted the Spill Act was not sufficiently unpredictable to satisfy this aspect of the *Chevron* criteria. Accordingly, we conclude that an exclusively prospective application of the Court's decision is inappropriate under these circumstances.

We also agree with the Tax Court's conclusion that the Environmental Protection Agency's (EPA) promulgation of the NCP and the NPL marked the critical dates on which preemption of remedial and removal expenditures, respectively, shall be deemed to have commenced. The NCP sets forth detailed criteria for determining whether removal actions may be financed by Superfund, imposes limits on the cost and duration of most removal actions, and prescribes the conditions under which such limits may be exceeded. 40 *C.F.R.* § 300.65 (b)(2) and (3) (1987). In addition, the NCP limits Superfund-financed remedial actions to sites listed on the NPL, 40 *C.F.R.* § 300.68(a) (1987), which was initially promulgated in September 1983 and thereafter amended and supplemented to include additional sites.

Plaintiffs, arguing that CERCLA's effective date of December 11, 1980, is necessarily the date of pre-emption, contend that New Jersey could have anticipated the impact of the NCP and NLP. Plaintiffs assert that two of New Jersey's worst sites had qualified prior to May 1981 for an unspecified amount of funding under the Clean Water Act, 33 *U.S.C.A.* §§ 1251-1376; the implication is that qualification of such sites for Superfund reimbursement was therefore inevitable. Plaintiffs also observe that four New Jersey sites had qualified in 1981 to receive money from Superfund for study and design work, and that a substantial number of New Jersey sites received high rankings on a list of EPA Region II sites designated as "candidates" for remedial funding under Superfund.

In response, the affidavit of defendant Robert E. Hunt, Administrator of Spill Fund from 1978 to 1986, described the difficulty experienced by DEP officials in 1981 and 1982 because "the scope of the federal program had not been defined and Superfund financing decisions appeared to be made by EPA on a case by case basis." According to Hunt, "there was virtually no money available from Superfund at this time and no real guidance from USEPA as to what activities would eventually be funded."

We need not resolve the conflict whether DEP, from the date of CERCLA's enactment, knew or should have known those hazardous waste sites that would be the inevitable beneficiaries of Superfund's resources. Suffice it to say that the manner in which Superfund was administered at that time leave us highly skeptical that its operational parameters could readily have been forecast by anyone outside the EPA. A typical account of Superfund's operations during this period is contained in a House Report, accompanying a predecessor bill to the Superfund Amendments and Reauthorization Act of 1986:

> The resources given to EPA were simply inadequate to fulfill the promises that were made to clean up abandoned hazardous wastes in this country. With political pressure on EPA to treat every site discovered

as a high priority, EPA was virtually guaranteed to fail from the moment CERCLA passed in 1980.

To compound the problem the first administrator of the Superfund program undermined the intent of the program. Under the initial leadership of Assistant Administrator Lavelle, the program was victimized by gross mismanagement and policies which limited expenditures for site cleanups, in part in an effort to dissuade Congress from extending the funding for the program beyond its scheduled expiration date of October 1, 1985. [H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. 1 at 55 (1985) *reprinted in* 1986 U.S. Code Cong. & Ad. News 2835.]

In any event, we are satisfied that the Supreme Court's reference to the NCP, supplemented by the NPL, as providing "criteria that determine what expenses, at which sites, will be eligible for Superfund money" was intended to demonstrate that the preemption period did not commence before these guidelines were promulgated. The Court explained that

> [h]aving decided that "may be compensated" should be given its ordinary meaning, we must define the category of expenses that may be compensated by Superfund. Fortunately, CERCLA itself furnishes an appropriate test. Section 105 (8) (B) of CERCLA, 42 USC § 9605(8)(B) requires the President to revise the National Contingency Plan (NCP) to reflect CERCLA's provisions. As part of that revision, the President must create and revise annually a list of sites most in need of federal efforts, now known as the National Priorities List. The NCP currently specifies that removal, or immediate cleanup, will be financed by Superfund only in emergency situations, see 40 CFR § 300.65 (1985). Remedial action will be financed only for sites on the National Priorities List, *id.*, § 300.68(a). Finally, the Environmental Protection Agency, pursuant to the NCP, has proposed criteria for the use of Superfund money for natural resource claims. See 50 Fed. Reg. 9593 (1985). The NCP, therefore, provides criteria that determine what

> expenses, at which sites, will be eligible for Superfund money. We therefore conclude that the NCP provides the appropriate measure of whether a given expenditure constitutes "costs of response or damages or claims which may be compensated" by Superfund. [475 *U.S.* at 374-75, 106 S.Ct. at 1115-16, 89 *L. Ed.* 2d at 381-82 (footnote omitted).]

We find the clear thrust of the Supreme Court's opinion to be that although CERCLA established the *principle* of pre-emption, the scope of pre-emption is a regulatory rather than statutory determination. Accordingly, until the NCP was first promulgated by EPA on July 16, 1982, 47 Fed. Reg. 31,180 (1982), and then revised on September 8, 1983, to include the first NPL, 48 Fed. Reg. 40,669 (1983), no agency guidelines existed to determine those remedial or removal actions that would be *eligible* for Superfund reimbursement, and for which funding by the Spill Fund was thereby preempted.

We reject the State's assertion that pre-emption should cease as of September 30, 1985, the date on which taxing authorization under CERCLA expired. 42 *U.S.C.A.* § 9653 (repealed by Pub. L. 99-499 § 571(b), 100 Stat. 1761 (1986)). From that date until enactment of SARA on October 17, 1986, CERCLA was funded by emergency appropriations. We can discern no clear congressional intention to terminate preemption for the brief period during which CERCLA was financed temporarily by appropriations from general revenues rather than by excise taxes on petroleum and chemicals. Accordingly, we hold that the period of preemption ended on October 27, 1986, the effective date of SARA, which repealed the preemption language in § 114(c) of CERCLA.

Our conclusions concerning the scope and period of pre-emption will require that this matter be remanded once again to the Tax Court. The purpose of the remand will be to permit the parties to establish a record upon which the Tax Court can determine the amount of Spill Fund expenditures that was pre-empted by CERCLA. In that connection, the State points out that establishing the beginning and end of the preemption period does not necessarily determine whether a particular expense incurred or paid by Spill Fund during the

preemption period should be treated as a "preempted" expense. The State contends that work authorized, commenced, or completed before the preemption period began, but paid for during the preemption period, should not be deemed preempted.

We are generally in accord with the State's position. If expenses to remove or remediate hazardous waste that are paid by Spill Fund before preemption began are not inconsistent with CERCLA, it should follow that expenses committed *before* but paid *after* the effective date of preemption should not be treated as preempted. The principle is that the Spill Funds' expenditures should not be deemed preempted by CERCLA unless the essential decision to commit the funds was made *after* promulgation of the NCP[4/] or NPL,[5/] as the case may be. We leave to the Tax Court on remand the task of determining precisely those expenditures that were permissible and those that were preempted.

Remedy

Preliminarily, we note our full accord with the Tax Court's conclusion that any technical noncompliance by plaintiffs with the provisions of *N.J.S.A.* 59:49-14 does not affect plaintiffs' right to relief. ——— *N.J. Tax* at ——— (slip op. at 28).

[4/] As noted, the effective date of preemption of removal actions that meet the criteria of the NCP is July 16, 1982. We note the State's reference, in its Exceptions to the Recommendations of the Tax Court, to objections communicated to EPA concerning the vagueness of the criteria for authorization of removal actions and the EPA's response to the effect that the criteria are adequate. It is self-evident that expenditures by the Spill Act for removal actions that EPA determined to be unauthorized by the NCP criteria are not preempted. In cases where EPA has not determined eligibility of a removal action pursuant to the NCP criteria, the Tax Court on remand must make that evaluation in order to determine if the expenditure was preempted.

[5/] The effective date of preemption of remedial actions for sites on the NPL is the date of promulgation of the NPL, or any amendment or supplement thereof, on which such site is first listed.

The remedy recommended by Judge Evers is thoughtful and practical. Essentially, the Tax Court proposed that an accounting or hearing be conducted to determine the amount of the preempted expenditures by the Spill Fund. The Legislature would then be accorded a reasonable time period to reimburse the Spill Fund for the entire preempted amount, using any source of funds other than the tax imposed by the Spill Act. If the Legislature does not reimburse the Spill Fund within the designated period, the Tax Court proposed that plaintiffs receive a refund of so much of the preempted expenditures as bears the same proportion to the total preempted expenditures as the Spill Act taxes paid by plaintiffs bears to the total amount of Spill Act taxes collected. In addition, the Tax Court recommended that if the Legislature reimbursed the Spill Fund and the reimbursement caused the amount of the Fund to exceed the statutory cap originally imposed by the Spill Act, *see supra* at ———— (slip op. at 12), the entire excess over the cap would be paid to plaintiffs.

In considering the appropriateness of the Tax Court's recommendations as to remedy, we accept plaintiff's premise that ordinarily a taxpayer that pays a tax found to be invalid is entitled to a refund. *Mayor of Jersey City v. Riker,* 38 *N.J.L.* 225, 227 (Sup. Ct. 1876); *accord In Re Fees of State Bd. of Dentistry,* 84 *N.J.* 582, 587 (1980); *Milmar Estate, Inc. v. Borough of Fort Lee,* 36 *N.J. Super.* 241 (App. Div. 1955). In this litigation, however, we must address a tax that has been invalidated only in part, and for a limited period. Furthermore, in framing the appropriate relief we are obliged to consider the context in which repeal of the limited pre-emption of the Spill Act occurred.

The background and need for the Superfund Amendments and Reauthorization Act, which appropriated $9 billion in additional funding to clean up hazardous waste sites, is summarized in the report of the House of Representatives Science and Technology Committee referred to above, *see supra* at ———— (slip op. at 19), that accompanied H.R. 2817, a predecessor to the bill ultimately enacted by Congress:

The Superfund program to clean up abandoned hazardous waste sites is one of the Nation's most important environmental programs designed to protect human health and the environment. It is also the most beleaguered program the Environmental Protection Agency (EPA) administers. If enacted, H.R. 2817 would give EPA the flexibility to revitalize the Superfund program, ensure cleanup of abandoned hazardous chemicals, and protect human health and the environment.

Superfund was passed in 1980 to address what many believed was a relatively limited problem. The EPA was instructed to find 400 hazardous waste sites. Most believed that cleaning up a site was relatively inexpensive and involved removing containers or scraping a few inches of soil off the ground. The Agency was given $1.6 billion to administer the cleanup of the 400 sites.

Today, five years later, our understanding of the problem posed by abandoned hazardous chemicals is entirely different. The Office of Technology Assessment now estimates there may be as many as 10,000 Superfund sites across the Nation, or an average of 23 sites per Congressional district. These sites range from industrial plants to river beds to city dumps where small businesses and households have disposed of solvents, paints and cleaning fluids. We now understand that a cleanup frequently goes far beyond simple removal of barrels. It often involves years of pumping contaminated water from aquifers. The total cost of completing the Superfund program is estimated to be as much as $100 billion. The total time will be decades.

* * * *

The current reauthorization, coming when it does, forces Congress to face a very fundamental policy question: how to ensure in the future that there are adequate resources, and to see that past, thoroughly repudiated, mismanagement problems are behind us.

H.R. 2817 has been written with the underlying belief that Congress should focus on ways to ensure rapid and thorough cleanup of abandoned hazardous wastes rather than on past mistakes. It is clear from the accumulating data on waste sites that EPA will never have adequate monies or manpower to address the problem itself. As a result, an underlying principle of H.R. 2817 is that Congress must facilitate cleanups of hazardous substances by the responsible parties while assuring a strong EPA oversight role with a set of tough legal enforcement standards. Equally important is the role of the communities around Superfund sites. It is here that we can ensure that cleanups and post-cleanup maintenance of the sites are carried out in compliance with the cleanup agreements for the sites. [H.R. Rep. No. 253, *supra*, at 54.]

In this connection, the repeal of section 114(c), the preemption provision of CERCLA, was explained by the Senate Committee on Environment and Public Works in its report on S.51, another predecessor to SARA:

> Clarification of section 114(c) appears desirable because of the litigation that has arisen from the original language in the statute. The litigation has been focused on the right of States to tax those substances which are taxed under the Federal Superfund law. To date, all decisions in State courts (including recent State Supreme Court rulings) have found that the Federal Superfund law does not preempt the rights of the States to raise taxes from these substances or through other special taxes. This litigation could continue for years. Any cloud of uncertainty over the legitimacy of these taxes should be removed at the earliest possible time.
>
> *It is widely recognized that States must develop their own taxes to meet their responsibilities for the State share of the cleanup costs at Superfund sites. In addition, States have responsibilities for managing and cleaning up hazardous materials not covered by the Federal program.* Clarification of section 114(c) will allow the State to move forward and develop the tax mechanisms necessary

> for meeting the growing funding needs for response to hazardous substance releases and participation in the Superfund program, as well as for maintaining effective State hazardous waste programs.
>
> The primary effect of the amendment will be to remove a potential barrier to the creation of State superfund programs. The amendment may result in an increase in the number and pace of hazardous substance response actions undertaken or partially funded by States, since States will be able to raise funds to assist such hazardous substance response. [S. Rep. No. 11, 99th Cong., 1st Sess. at 59, 60 (1985), *reprinted in* 1986 U.S. Code Cong. & Ad. News 2835 (emphasis added).]

In the course of Senate debate on S.51, Senator Lautenberg of New Jersey offered this explanation for the proposed repeal of section 114(c) :

> Mr. President, S.51 clearly addresses an issue that has hindered State efforts to set up their own superfunds. Because of a suit filed in New Jersey, which questioned the right of a State to tax the same sources taxed by the Federal Superfund, State Superfund programs have had a cloud over them. This has certainly been the case in New Jersey, where the State was extremely reluctant to spend funds out of our spillfund without this litigation being settled. S.51 strikes the so-called preemption language in existing law which created this legal ambiguity. Approval of the bill will end years of litigation and free States to conduct aggressive cleanup programs with their own funds. [116 Cong. Rec. S11,581 (daily ed. Sept. 17, 1985, at S11, 581.]

Subsequently, in the debate on the conference report of SARA, Senator Lautenberg stated that the repeal of section 114(c) would

> [o]verturn the Supreme Court's Exxon versus Hunt decision, which preempted State taxing authority for State spill funds, such as New Jersey's. This provision is critical to New Jersey's plans for complementing the

> Federal Superfund Program with a State supported cleanup program. [135 Cong. Rec. S14,912 (daily ed. Oct 3, 1986).]

These excerpts from the legislative history of SARA reflect Congress's recognition not only of the enormity of the hazardous waste cleanup problem but also of the importance of State and local cooperation to assist the federal government in this complex and difficult undertaking. It is obvious that the repeal of section 114(c) was intended to encourage and facilitate State participation in the long-term cleanup effort.

Under these circumstances, we are constrained to fashion a remedy for the collection of Spill Act taxes during the preemption period that least offends the congressional purpose in repealing preemption. On another recent occasion involving an invalid tax statute, we used our equitable powers to construct a remedy consistent with the attendant circumstances. *See Salorio v. Glaser,* 93 *N.J.* 447, *cert. denied,* 464 *U.S.* 993, 78 *L. Ed.* 2d 682 (1983) (holding unconstitutional the imposition of the Emergency Transfer Tax on New York residents who commuted to work in New Jersey, but restricting decision to prospective application). As we observed in *Salorio,* "Equitable remedies * * * 'are a special blend of what is necessary, what is fair, and what is workable,'" *id.* at 464 (quoting *Lemon v. Kurtzman (Lemon II), supra,* 411 *U.S.* at 200, 36 *L. Ed.* 2d at 161).

Accordingly, we conclude that under these unique circumstances the appropriate remedy in this matter is that which best implements the intent of Congress in adopting SARA and the intent of the Legislature in adopting and amending the Spill Act. The uncontradicted record before us indicates that the Spill Fund's needs are likely to exceed its resources for some time. The Legislature has only recently increased both the tax rate and the tax base in order to augment the Spill Fund's revenues. Congress has evidenced its intention to encourage an enhanced State role in hazardous waste cleanup.

In this setting, a partial tax refund to plaintiffs should be a remedy of last resort. Instead, we adopt that part of the

Tax Court's recommendation that conditions the payment of a pro-rata refund upon the Legislature's failure to reimburse the Spill Fund for the amount of expenditures found to be preempted. In our view, reimbursement of the Spill Fund from non-Spill Act revenues vindicates the Spill Fund's payment of preempted expenses in a manner most consistent with the objectives of Congress and the Legislature. We conclude that a period of six months from the final determination of the amount of preempted expenditures, from which no appeal is pending or can be taken, is sufficient for the Legislature to take action to reimburse the fund. In this connection, we hold that reimbursement of the Spill Fund must be for the entire amount of preempted expenditures, and reject the State's contention that pro-rata reimbursement proportionate to the plaintiffs' share of Spill Act taxes is sufficient. The thrust of this remedy is to make the Spill Fund whole.

In the event the Legislature does not appropriate funds sufficient to reimburse the Spill Fund for the full amount of preempted expenditures within such six-month period, the Fund shall refund to the plaintiffs, pro rata, so much of the preempted expenditures as bears the same proportion to the total preempted expenditures as the Spill Act taxes paid by plaintiffs bears to the total amount of Spill Act taxes collected. In view of the repeal of the cap provisions of the Spill Act as originally enacted, the Tax Court's recommendation in paragraph 4(a) of its Summary is no longer appropriate. ———— *N.J. Tax* at ———— (slip op. at 39).

For the reasons stated, the recommendations of the Tax Court, as modified by this opinion, are adopted. The matter is remanded to the Tax Court for further proceedings consistent with this opinion. We do not retain jurisdiction.

Justices Clifford, Handler and Pollock and Judges Pressler and King join in this opinion. Chief Justice Wilentz and Justices O'Hern and Garibaldi did not participate.

APPENDIX G

TAX COURT OF NEW JERSEY

September Term 1984

A-66

EXXON CORPORATION, et als,

Plaintiffs-Appellants,

vs

ROBERT HUNT, et als,

Defendants-Respondents.

On Remand from Supreme Court of New Jersey

RECOMMENDATIONS PURSUANT TO REMAND

JOHN F. EVERS, J.T.C.

STATEMENT OF THE CASE

The United States Supreme Court in this matter, (reported at 106 *S. Ct.* 1103 (1986)) interpreted § 114(c) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) , 42 *U.S.C.* § 9601, *et seq.* as preempting contributions to any state fund that is intended to pay for the same types of expenses that may be paid by the Fund (superfund) established under CERCLA. The Supreme Court reversed the decision of the New Jersey Supreme Court to the extent that it held that the New Jersey Spill Compensation and Control Act (Spill Act), *N.J.S.A.* 58:10-23.11 *et seq.*, could constitutionally impose a tax on

plaintiffs to support expenditures which are eligible for superfund financing. The Supreme Court affirmed the decision of the New Jersey Supreme Court to the extent that it held that the Spill Act could constitutionally impose a tax to support expenditures that are not eligible for superfund financing.

The purposes of the Spill Act which were found to be non-preempted by the Supreme Court because they are clearly beyond the scope of CERCLA and, therefore, not covered by § 114(c), 42 *U.S.C.* § 9614(c), include: (1) to compensate third parties for damages resulting from hazardous substance discharges; (2) to pay personnel and equipment costs; (3) to administer the New Jersey spill fund; and (4) to conduct research. The purposes of the Spill Act which the Supreme Court found to be preempted by § 114(c) because they fall within the scope of CERCLA are (1) the financing of governmental cleanup of hazardous waste sites, including remedial costs for sites on the National Priority List (NPL) and removal costs that are eligible for superfund compensation under the terms of the National Contingency Plan (NCP); and (2) the reimbursement of third parties for cleanup costs, except to the extent that these two categories of expenditures are intended to provide the 10% state share of remedial costs. The Supreme Court held that, to the extent the Spill Act permits taxation to support pre-empted expenditures, it cannot stand, and remanded the case to the New Jersey Supreme Court which remand, in pertinent part, stated:

> We leave to the New Jersey Supreme Court the state law question whether, or to what extent, the nonpre-empted provisions of the statute are severable from the pre-empted provisions. . . .
>
> . . . [T]he case is remanded for further proceedings not inconsistent with this opinion. 106 *S. Ct.* 1116-1117.

I. ISSUES (AND PROBLEMS) PRESENTED DUE TO THE NATURE OF THE UNITED STATES SUPREME COURT REMAND.

While that part of the Supreme Court remand which leaves to the New Jersey Supreme Court the state law question whether, or to what extent, the non-preempted provisions of the statute are severable from the preempted provisions is clear, the language concerning further proceedings not inconsistent with the opinion is unclear and, it is submitted, its intent can only be ascertained through an analysis of the Court's reasoning as expressed in its opinion. Such question arises not only as a legal proposition but out of practical considerations as well.

A cursory reading of the remand suggests that the Court must focus, at least initially and perhaps exclusively, on the severability issue. Following a resolution of that question however, the question arises — what now? Unlike the language employed in *Exxon Corp. v. Eagerton,* 462 *U.S.* 176 (1983), (also authored by Justice Marshall and specifically referred to by the Justice in the instant remand), where, after concluding that a portion of an Alabama tax (on oil and gas extracted from Alabama wells) was preempted, the high court said:

> Since the severability of the pass-through prohibition from the remainder of the 1979 amendments is a matter of state law, we remand to the Supreme Court of Alabama for that court to determine whether the partial invalidity of the pass-through prohibition entitles appellants to a refund of some or all of the taxes paid under protest. [at 197]

here the Court made no reference to the question of refunds whatsoever. The reasons suggested for the absence of such refund language in the instant matter are discussed *infra*, but in any event it appears that the New Jersey Supreme Court, as well as the parties, assumed that the real question presented on remand dealt with refunds — and then not "if" but rather "how much". (Note that the New Jersey Supreme

Court, in its remand, directed the Tax Court to make such calculations).[1/]

In an apparent attempt to formulate a method of determining the exact amounts of spill fund monies which were devoted to preempted purposes and thence a determination of the exact refunds due each plaintiff, the parties embarked on a course of considerable "informal" discovery. (See appendix in support of plaintiffs' motion for summary judgment). It soon became apparent (to the parties and this Court) that such an undertaking, if pursued to a conclusion, would be staggering in terms of time and money. For example, Robert Hunt, (who from January 1978 until January 1986 was the Chief Executive of the spill fund), stated, "It would be extremely difficult, if possible at all, to determine which expenditures were for work completed or contracted for before April, 1981 but paid after that date,"[2/] and "Numerous other examples can be given for sites where significant amounts of spill fund monies were spent for cleanup at a site which was eventually put on the NPL." (National Priority List). (Hunt affid. July 16, 1986, p.6).[3/]

[1/] Justice Stevens, in his dissent, also recognized the absence of any direction as to payment of refunds. He said:

> But since the Court concludes that the Spill Act is "preempted in part," *ante*, at 1; accord, *id.*, at 19, it must confront the difficult question of relief. In keeping with its "partial preemption" analysis, the Court should advise the New Jersey courts how they should calculate the partial refund of taxes to which appellants are *presumably* entitled on remand. 106 *S. Ct.* 1120 [emphasis supplied].

[2/] While CERCLA was effective in December 1980, superfund tax was not collected until April 1981.

[3/] Although Congress directed that the superfund program be implemented through a revised NCP to be adopted by June 1981, the EPA did not meet this deadline and the NCP, revised pursuant to CERCLA, was not published until July 16, 1982. Once published the NCP limited superfund expenditures for remedial (long-term cleanup) actions to sites on the NPL which was to be a compilation of the worst sites nationwide. However, EPA did not officially promulgate the NPL until September 8, 1983, more than a year after the NCP was promulgated.

Additionally, concerning the problems associated with extensive discovery, David Mack, (prior to his appointment as Acting Administrator of spill fund in February 1986, Mr. Mack was a regulatory officer of the New Jersey Department of Environmental Protection (DEP)), whose responsibilities included the monitoring of the spill fund's activities and who was also involved in New Jersey's hazardous waste cleanup program since 1980, which involvement included negotiating contracts and agreements under the superfund program between DEP and United States Environmental Agency (EPA), stated:

> This information, (a list of expenditures at sites on the NPL from December 1980 [effective date of CERCLA] to the present), was provided [to plaintiffs], but it should be noted that the costs listed include expenditures contracted for and paid prior to listing on the NPL; expenditures contracted for prior to listing on NPL but paid after listing; administrative charges billed directly to the project account; costs later reimbursed by EPA for advanced funding; costs EPA declared to be ineligible for funding; and costs which may be credited in the future against the State's mandated 10% share. Our records reveal the date on which invoices are paid, but not the date on which the work was contracted for or actually performed. . . .
>
> To discover the date of performance, however, every invoice would have to be examined. Such an undertaking is staggering in terms of time and resources when 99 New Jersey sites — the number currently on the NPL — are involved. At *least* 1,800 invoices would have to be scrutinized. Indeed, the spill fund would have to hire either a contractor or new staff to perform this lengthy task. Additionally, these invoices would have to be scrutinized to determine whether non-preempted costs such as administrative costs had been included. [Mack affid. July 15, 1986, pp. 5 & 6]

Under the circumstances it was agreed that certain legal issues, (arising primarily from the imprecise directions of the United States Supreme Court), should first be addressed; the

thought being that a decision on those questions would possibly decrease the time and expense, and perhaps completely avoid the need, of such a detailed accounting. Accordingly extensive briefs were submitted concerning the issues of prospectivity vis-a-vis retroactivity, (of the Supreme Court decision); severability; extent of refunds, if any; and the applicability (and compliance with, if applicable) of *N.J.S.A.* 54:14-14, (State Tax Uniform Procedure Law).[4/]

II. SHOULD THE UNITED STATES SUPREME COURT DECISION BE APPLIED PROSPECTIVELY?

As indicated in the Statement of the Case the United States Supreme Court remanded this matter for the purpose of determining, "whether, or to what extent, the non-preempted provisions of the statute are severable from the preempted provisions." 106 *S. Ct.* at 1116. To carry out the Court's mandate, the first question to be addressed is whether its order to determine severability of the preempted portions of the Spill Act is to have retroactive or prospective effect. The answer to that question turns on whether the decision itself is to be applied retroactively or prospectively. It is determined that the decision is to have prospective effect only if it follows that severability of the Spill Act for the period prior to March 10, 1986, the date of the United States Supreme Court decision, is not an issue because the Act will be treated as valid up to that date. Such decision will also determine whether plaintiffs are entitled to refunds for amounts paid for preempted purposes prior to March 10, 1986. If it is to be applied prospectively it follows that there can be no refunds for amounts paid prior to that date even though the spill fund used tax monies for preempted purposes. Defendants' position is that the decision must be given prospective effect and consequently severability is an issue only from March 10, 1986 and further that plaintiffs are not entitled to refunds for any tax paid prior thereto.

[4/] Plaintiffs also seek an injunction against enforcement of the spill tax taxing provisions until the New Jersey Supreme Court resolves the remand from the United States Supreme Court in the instant matter.

Oral argument was waived pursuant to R. 1: 6-2.

Plaintiffs argue that defendants' motion for prospective effect ignores the limited scope of the remand by the United States Supreme Court, which according to plaintiffs, was confined strictly to the question of severability. Because the Spill Act was not devoted exclusively to purposes preempted by § 114(c) of CERCLA, according to plaintiffs it was necessary for the United States Supreme Court to remand this matter, "for further proceedings not inconsistent with this opinion." 106 *S. Ct.* at 1117. Plaintiffs further contend that the high court was quite explicit as to the scope that would be open on remand:

> State legislation is invalid 'to the extent that it actually conflicts with federal law,' *Pacific Gas & Electric Co. v. Energy Resources Commission,* 461 *U.S.* 190, 204 . . . (1983), and such a conflict has been demonstrated in this case. We leave to the New Jersey Supreme Court the State-law question whether, or to what extent, the non-preempted provisions of the statute are severable from the pre-empted provisions. *Exxon Corp.* v. *Eagerton,* 462 *U.S.* 176, 196-97 (1983).

Id. at 1116.

Thus, they assert that the only issue on remand is the state-law question as to the possible severability of the non-preempted provisions of the Spill Act. Defendants' argument that plaintiffs should be denied refunds of all taxes paid prior to the United States Supreme Court decision does not fall within the scope of the remand, according to plaintiffs. Thus it is argued that to hold that the decision should be applied only prospectively would result in a complete nullification of the Court's decision.

I disagree with plaintiffs' contention that prospectivity is a non-issue. As noted earlier I do not find the remand language of the United States Supreme Court to be as "crystal clear" as suggested by plaintiffs. Secondly, although the courts initially espoused the common law doctrine that an invalidated statute must be deemed a nullity from the moment of its adoption (". . . in legal contemplation as inoperative as though it had never been passed," *Norton v. Shelton County,*

118 *U.S.* 425, 442 (1886)), the rigidity of the rule and the impractical and harsh results which it compelled in invalidating all past transactions made in reliance upon a purportedly legitimate statute led the Supreme Court in *Chicot Co. Drainage Dist. v. Baxter State Bank,* 308 *U.S.* 371 (1940), to reason that the "broad statements" of absolute retrospective invalidity espoused in *Norton* were unjustified.

Subsequent to *Chicot Co. Drainage, supra,* two United States Supreme Court cases conclusively silenced the *Norton* doctrine of invariable and total retroactivity. In the first, *Chevron Oil Co. v. Huson,* 404 *U.S.* 97 (1971), the Court held that its earlier decision in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 *U.S.* 352 (1969) should be applied prospectively only. In *Rodrigue* the Court had held that state law would be incorporated into federal law and applied in actions for personal injuries on fixed structures located on the Outer Continental Shelf. The plaintiff in *Chevron* had filed suit prior to the Court's decision in *Rodrigue* and had relied on the longer statute of limitations under admirality law which at that time was held to be applicable in actions brought under the Outer Continental Shelf Lands Act. In holding that Rodrigue would be applied prospectively with the result that the plaintiff's action was not time barred, the Court set up a three-part test to determine whether a particular decision should be applied prospectively or retrospectively. First, in order to be applied prospectively, the decision "must establish a new principle of law either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . ." 404 *U.S.* at 106. Secondly, a determination must be made whether the purpose and effect of the new rule will be furthered or retarded by its retrospective application. *Id.* at 107. Third, the Court should weigh "the equity imposed by retroactive application" and should avoid retroactivity where to do so "could produce substantial inequitable results. . . ." *Ibid.*

To preclude retroactivity, defendants must satisfy all three parts of the *Chevron Oil* test. *EEOC v. MTC Gear Corp.* 595 *F. Supp.* 712, 715 (D.C. Ill. 1984). An examination of the facts here leads to the conclusion that, while

parts two and three of the *Chevron* test may be satisfied, the first part is not.

In ruling that its earlier decision in *Rodrigue* was to have prospective application the *Chevron court* said:

> *Rodrigue* was not only a case of first impression in this Court under the Lands Act, but it also effectively overruled a long line of decisions by the Court of Appeals for the Fifth Circuit holding that admirality law, including the doctrine of laches, applies through the Lands Act. *See, e.g., Pure Oil Co. v. Snipes,* 293 *F.*2d 60; *Movable Offshore Co. v. Ousley,* 345 *F.*2d 870,; *Loffland Bros. Co. v. Roberts,* 386 *F.*2d 540. When the respondent was injured, for the next two years until he instituted his lawsuit, and for the ensuing year of pretrial proceedings, these Court of Appeals decisions represented the law governing his case. It cannot be assumed that he did or could foresee that this consistent interpretation of the Lands Act would be overturned. The most he could do was to rely on the law as it then was. [404 *U.S.* 1071]

While acknowledging that § 114(c) of CERCLA was "not a model of legislative draftsmanship," 106 *S. Ct.* at 1109, the Supreme Court decided the case based on the well established principles of express preemption as applied to the language of the statute. It held that it, (§ 114(c)) was meant to forbid the States from imposing taxes to finance certain types of expenditures. This case is therefore significantly different from *Rodrigue* which overruled along line of decisions.

Furthermore, the situation here also significantly differs from *Lemon v. Kurtzman,* 411 *U.S.* 192 (1973) (*Lemon II*) where the Court held that its earlier invalidation of a Pennsylvania statute (*Lemon v. Kurtzman,* 403 *U.S.* 602 (1971) (*Lemon I*)), should be applied prospectively. The Pennsylvania statute had permitted the State to reimburse private sectarian schools for certain educational services. A divided Court struck down the Pennsylvania statute under the establishment clause of the First Amendment. The plaintiffs then sought to enjoin the State from reimbursing the schools

for the current school year although the schools had already performed the services for which they were to obtain reimbursement. The Court refused to enjoin the reimbursement. Nor does the instant matter present a *Salorio* type situation, (*Salorio v. Glaser*, 93 *N.J.* 447 (1983)), where the Court held that its decision invalidating the emergency transportation tax (ETT) under the Privileges and Immunities Clause would be applied prospectively.

In *Lemon II* and *Salorio* the state expenditures were held to be invalid under general provisions of the federal Constitution, which necessarily must await a definitive court ruling before their contours are established. *See Lemon II*, 411 *U.S.* at 108. Here, by contrast, Congress commanded in December 1980 that, "no person may be required to contribute to any fund the purpose of which is to pay compensation for claims . . . which may be compensated under CERCLA." 42 *U.S.C.* § 9614(c). The United States Supreme Court's interpretation of the preemptive language of § 114(c) which was based on the Federal Supremacy clause, did not "establish a new principle of law either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . . *Chevron Oil Co. v. Huson, supra,* at 106.

Additionally it appears that defendant's "reliance" argument is questionable. The legislative history of CERCLA § 114(c) reveals that the defendants were aware of the statute's probable preemptive effect on the spill fund. Jerry English, (former DEP Commissioner), observed that the predecessor to § 114(c) would have the effect of "'swiss-cheese preemption', because it would shoot holes in State laws to the extent incidents or damages are compensable under the federal law. . . ." The Environmental Law Institute, *Superfund; A Legislative History* 534 (1983). (Supplemental appendix to plaintiffs' brief in opposition to defendants' motion for summary judgment and in support of plaintiffs' motion for an injunction). Of note also are the statements of Robert Hunt. "Upon the adoption of the Superfund Act in December 1980, I became concerned about the impact of the preemption language on the spending

alternatives of the spill fund", (Hunt affid., p. 2), and again ". . . we in New Jersey felt that we had to be prepared to use the spill fund to address pressing State priorities even if we were risking the possibility of some conflict in regard to the preemption language contained in the Superfund Act." (Hunt affid., p. 4).

As earlier noted both *Lemon II* and *Salorio* involved the invalidation of State laws on *constitutional grounds*. In such cases, courts are entitled to shape their decrees in accordance with traditional equitable principles unconstrained by legislative directives. This case, however, involves an explicit statement of policy by the Congress on a matter indisputably within its authority that gives courts no such discretion to withhold relief to persons protected by the statute. Congress, in § 152 of CERCLA expressly stated that § 114(c) would become effective on passage, (in contrast with the predecessor version in H.R. 85 which had a 180 day delay in its preemption provision). Thus it is clear that under *Chevron,* and § 114(c), the courts are not permitted to contradict the legislative command based on their conceptions of equity or public policy. In *TVA v. Hill,* 437 *U.S.* 153, 193-95 (1978), the Court refused to exercise any equitable discretion to deny relief to plaintiffs once it determined that the statute had been violated and that Congress had left no room for equity courts to carve out exceptions to its clear commands. *Id. Accord Badaracco v. Comm'r,* 464 *U.S.* 386, 398 (1984).

The finding that the United States Supreme Court's decision should be applied retroactively and not prospectively gives rise to the next question which will now be addressed.

III. TO WHAT EXTENT SHOULD THE UNITED STATES SUPREME COURT DECISION BE RETROACTIVELY APPLIED?

The answer to this question is found by scrutinizing the Supreme Court decision itself. We know that § 114(c) states:

> Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which

> is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter. 42 *U.S.C.* § 9614(c).

We know that the high court, based on § 114(c), found that in some areas there was an overlap in the superfund-spillfund purposes. We also know that those purposes were identified as (1) the financing of governmental cleanup of hazardous waste sites, including remedial costs for sites on the NPL and removal costs that are eligible for superfund compensation under the terms of NCP; and (2) the reimbursement of third parties for cleanup costs, except to the extent that these two categories of expenditures are intended to provide the state share of remedial costs. We further know that it was not the collection of the Spill Act tax that the Court found to be improper but rather certain expenditures made from the fund.

> Our remaining task is to determine whether the "purpose" of the Spill Fund is *to pay costs* that we have found to fall within the scope of preemption.
>
> Those parts of the statute that permit Spill Fund *expenditures* beyond this state share for remedial costs for sites on the National Priority List, or for removal costs that are eligible for Superfund compensation under the terms of the NCP, are preempted by § 114(c). 106 *S. Ct.* 1116 [emphasis supplied].

What we do not know, and what neither the United States Supreme Court nor the Congress knew, because at the time of enactment of CERCLA and its § 114(c) they could not know, were the specific sites within the scope of the preempted purposes. New Jersey knew what it did but the United States did not know what it (the Federal Government) would do or where.

The Court found that two of the six purposes of spill fund were preempted.

> As we have explained above, the Spill Fund may be used for six purposes: (1) to finance governmental cleanup of hazardous waste sites; (2) to reimburse third

> parties for cleanup costs; (3) to compensate third parties for damage resulting from hazardous substance discharges; (4) to pay personnel and equipment costs; (5) to administer the fund itself; and (6) to conduct research. Of these the latter four are clearly beyond the scope of CERCLA, and are therefore not covered by § 114(c). The first two are within the scope of CERCLA, except to the extent that they are intended to provide the 10% state share of remedial costs. 106 *S. Ct.* 1116.

Obviously, in recognition that such conclusion was abstract and without more would not provide a resolution to the conflict, the Court found a yardstick with which to measure those expenditures which may be compensated by superfund. Without an appropriate measure those expenditures found in the above-noted two categories would be preempted notwithstanding that, at least some of them, could never be paid from superfund. The Court said:

> Having decided that "may be compensated" should be given its ordinary meaning, we must define the category of expenses that may be compensated by Superfund. Fortunately, CERCLA itself furnishes an appropriate test. Section 105(8)(B) of CERCLA, 42 *U.S.C.* § 9605(8)(B), requires the President to revise the National Contingency Plan (NCP) to reflect CERCLA's provisions. As part of that revision, the President must create and revise annually a list of sites most in need of federal efforts, now known as the National Priorities List. The NCP currently specifies that removal, or immediate cleanup, *will* be financed by Superfund only in emergency situations, see 40 CRF § 300.65 (1985). Remedial action *will* be financed only for sites on the National priorities List, *id.* § 300.68 (a). Finally, the Environmental Protection Agency, pursuant to the NCP, has proposed criteria for the use of Superfund money for natural resource claims. See 50 Fed. Reg. 993 (1985). The NCP, therefore, provides criteria that determine what expenses, at which sites, *will* be eligible for Superfund money. We therefore conclude that the NCP provides the appropriate measure of whether a given expenditure contitutes "costs of response or damages or

> claims which may be compensated" by Superfund. 106 *S. Ct.* 1115 [emphasis supplied][5/]

Close scrutiny of the foregoing language discloses however that the NCP only specifies that removal, or immediate cleanup expenses, will be paid only in emergency cases. As to remedial (long term) activities superfund may pay those expenses only in connection with the sites appearing on the NPL. Therefore, while the NCP serves as a measure for preempted emergency (immediate) cleanup expenses, it can only be in conjunction with the NLP that it can likewise serve in connection with remedial (long term) preempted expenditures.

It cannot be doubted that the Supreme Court was aware that the NCP and NPL were not effective on the date CERCLA was enacted, when the Court declared the NCP and NPL to be the guidelines of preempted expenditures. Had the Supreme Court believed that expenditures made before the adoption of the NPL and NCP were subject to the preemption provision, it is reasonably assumed that it would have provided a second guide for expenditures preempted during the initial period following the adoption of CERCLA. Since no mention was made of that time period, it is obvious that the Court did not believe that any spill fund expenditures were preempted until after the superfund program was in place and ready to operate pursuant to the promulgated NCP and NPL.

That conclusion is reenforced by reference to 42 *U.S.C.* § 9611 which defines the types of removal actions which will be financed by superfund. Subsection (a)(2) states that superfund may be used for:

[5/] Curiously the Court used the word "will" (be financed) (be eligible) in deciding the class of expenditures which "may" be compensated. See *Exxon v. Hunt*, 97 *N.J.* 526, 534 (1984) where Justice Clifford, quoting from the Tax Court opinion (4 *N.J. Tax* 294, 307 (Tax Ct. 1982)), stated, "[t]he seemingly simple, but often misused and misapplied word 'may' is anything but unambiguous."

> Payment of any claim for necessary response costs incurred by any other person *as a result of carrying out the national contingency plan* established under section 1321(c) of Title 33 and amended by section 9605 of this title: Provided, however, that such costs must be approved under said plan and certified by the responsible Federal official. . . . [42 *U.S.C.* § 9611(a)(2).] [emphasis supplied]

Without the NCP this section provides no guidance whatsoever. Prior to publication of the NCP and NPL, only to the extent that superfund money was actually committed to New Jersey projects did the State have reason to know that spill fund expenditures were preempted. In those instances, according to defendants, no spill fund monies were spent.

Further scrutiny of the above Supreme Court language reveals that, in its reference to the use of NCP as an appropriate measure, it recognized that the NCP speaks to the future, not to the past. Thus reason and logic dictate that in defining the immediate cleanup purposes which are preempted it could only be from the date of promulgation of the NCP that the expenditures would be preempted. Similarly it was only upon the promulgation of the NPL that expenditures in the prohibited remedial category are prohibited. Any other interpretation would render unintelligible the Court's reference to "what expenses, at which sites, will be eligible for superfund money." 106 *S. Ct.* at 1115.

The revised NCP was promulgated July 16, 1982 (42 *Fed. Reg.* 31180) although the first NPL was not promulgated (as part of the NCP) until September 8, 1983.[6/]

[6/] The following provision was included in the Federal Register concerning those dates:

> Under Section 305 of CERCLA, this revised Plan cannot take effect until Congress has had at least sixty "calendar days of continuous session" from the date of promulgation in which to review the Plan. Since the actual length of this review period is affected by congressional action, EPA will publish a notice in the Federal (continued...)

Accordingly, if spill fund is found to be severable and if plaintiffs are entitled to refunds, the refunds will be calculated from those dates.

In arriving at this conclusion I have not overlooked plaintiffs' claim that from the enactment of CERCLA, New Jersey had sufficient guidance to know what sites would be eligible for superfund and could have amended the Spill Tax to reflect such "would-be eligibility."[7]

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[6](...continued)
Register at the end of the review period announcing the effective date of the Plan.

Notwithstanding this provision and the absence of any publication in the Federal Register, defendants accept these dates as the dates of final adoption of the NCP and NPL.

[7] See Appendix in support of plaintiff's motion for summary judgment and particularly the following exhibits which, according to plaintiffs, prove that:

1. Chemical Control and Goose Farm had already qualified for funding under §§ 311 of the Clean Water Act (Ex. E and M) leaving no doubt that they would be included on the NPL.

2. The NPL itself was to be compiled on the basis of the Federal Hazard Ranking System (HRS). Seventy-two sites were submitted as candidates initially by New Jersey. (Ex. Q, p. 2).

3. Pursuant to the HRS, in February 1981, four sites in New Jersey: Bridgeport, Burnt Fly Bog, Kin-Buc and Lipari Landfill were selected for funding by superfund for remedial site study and design. (Ex. N).

4. The Abandoned Site Cleanup Report issued by the DEP on May 1, 1981 (Ex. M) disclosed that as of that date, application for superfund money was pending on Chemical Control and Goose Farm, and that superfund awards had already been made on Burnt Fly Bog, Bridgeport Rental, Kin-Buc and the Lipari Landfill.

5. In July 1981, EPA listed its rating scores (Ex. O) for compilation of the Interim Priority List. New Jersey had 16 sites which received high rankings. In addition to the six above mentioned sites, they included Price Landfill, Pijack Farm, Spence Farm, Lone Pine Landfill, Motel Dennis, Williams Property, Upper Freehold, Krysowaty Farm, King
(continued...)

At the outset it must be noted that plaintiffs' conclusions are based on information furnished by defendants. Furthermore it should be remembered that CERCLA was not even signed into law until December 1980. Clearly no expenditures prior to that date could be considered preempted. Beyond that, taxing authority for CERCLA was not effective until April 1981. Preemption could not have been contemplated before that date. Moreover plaintiffs use figures from the Spill Fund Annual Report for 1982 and 1983 which included all expenditures made at sites from the inception of the spill fund in 1977 until June 30, 1983. Again, these figures include expenditures made before CERCLA was enacted as well as for nonpreempted purposes at the sites. Furthermore, it is irrelevant that spill fund expenditures were made for NPL sites as there is no limitation of the use of any or all of spill fund monies at NPL sites for non-preempted purposes.

As to plaintiffs' claim that certain projects "without question" constitute removal actions within the meaning of CERCLA, it appears that plaintiffs' erroneously relied on the statute, rather than the NCP for description of a removal action and further ignored 40 *C.F.R.* 300.65 which establishes criteria for removal actions and limits the amount of time or money that can be spent on a removal action. In pertinent part 40 *C.F.R.* 300.65(a)(3) states:

7/(...continued)
of Prussia and Bog Creek Farm
(Ex. O).

6. In October 1981, EPA issued the Interim Priority List of 115 of the Nation's worst sites. Of this number, eleven sites were from New Jersey. (Ex. P).

7. In December 1982, EPA released its NPL; of the 418 hazardous waste sites listed, 65 were from New Jersey.
(Ex. Q, p. 2).

8. Since that time, the NPL has been amended so that currently 99 sites from New Jersey are on the NPL.
(Ex. I, Att. II).

> Removal actions, other than those authorized under Section 104(b) of CERCLA, shall be terminated after $1 million has been obligated for the action or six months have elapsed, unless the lead agency determines that (certain factors exist at the site).

It further appears that plaintiffs have not thoroughly analyzed nor utilized all of the information supplied on which they rely. By way of example, it appears that the figures recited for the projects targeted by plaintiffs do not necessarily represent what plaintiffs imply. Exhibit L was provided to plaintiffs with a cover memo addressed to a Deputy Attorney General which cautioned against misuse of the figures provided. The figures represent the total amounts spent at any site which has ever been included on the NPL including money spent prior to December 1980 (effective date of CERCLA) and certainly prior to the adoption of the revised NCP, as well as money spent after CERCLA's taxing authority expired.[8/] It also includes amounts which were later reimbursed by the Capital Fund (general revenue account) if the project was later found to have been an emergency type removal action which was not carried out in accordance with the NCP. Plaintiffs cannot claim any impropriety for preempted expenditures which have been reimbursed to the spill fund.

IV. SEVERABILITY: ARE THE PREEMPTED PROVISIONS OF THE SPILL ACT SEVERABLE?

It is axiomatic that the non-preempted provisions of a statute can escape invalidity only to the extent they can be severed from the preempted provisions. It is recognized that the doctrine of severability must be applied with caution for, in the enforcement of valid portions of a statute which contains invalid portions also, there is a danger of judicial

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[8/] CERCLA was a temporary experiment; the authorization to collect the tax and to appropriate general revenues expired on September 30, 1985. On April 1, 1986 Congress appropriated a "one-shot" infusion of $150,000,000 which was available for obligations only until May 31, 1986. *P.L.* 99-270. On October 17, 1986 new Superfund legislation was adopted which provides for an appropriation of $9,000,000,000.

usurpation of the legislative power. *Washington Nat'l. Ins. Co. v. Board of Review,* 1 *N.J.* 545, 556 (1949). Accordingly, the party seeking severance must establish that (1) the Legislature clearly manifested its intention that it would not have enacted the valid provisions independently of the invalid provisions and (2) the valid and invalid provisions are not so intimately connected with and dependent upon each other so as to make the statute one composite whole. See *Affiliated Distillers Brands Corp. v. Sills,* 60 *N.J.* 342, 345-46 (1972); *Lane Distrib. Inc. v. Tilton*, 7 *N.J.* 349, 369-70 (1951).

Admittedly funding for the cleanup and removal of hazardous substances eligible for Superfund financing was within the purpose of the New Jersey Spill Tax. Equally as clear is that funding for those purposes found to be not preempted was also included. The problem, as presented by plaintiffs, is that all purposes are funded by a single tax. According to plaintiffs the tax rate and the expenditures it supports constitute an integral whole, intimately connected and interdependent rendering it impossible for the court to sever the non-preempted items of spill fund since severance would require the establishment of a new tax rate. Citing the *N.J. Const.* Art. VI, § 6, par. 1 (1947), which states that the taxing power is vested exclusively in the Legislature, plaintiffs argue that, as a matter of constitutional law, the New Jersey judiciary is prohibited from recomputing a tax rate for the spill fund to reflect expenditures for non-preempted purposes. Since the spill fund has only one tax rate which is invalid and incapable of judicial recomputation, the entire taxing scheme is invalid, according to plaintiffs.

To the extent that the Spill Act contains a single tax that cannot be apportioned between its preempted and non-preempted purposes, plaintiffs are correct. To the extent that the fact of a single tax rate renders the act incapable of severability, plaintiffs' argument misses the point.

As the Supreme Court noted, the issue of whether an invalid portion of a state statute is severable from the remainder of the statute is an issue of state law. This Supreme Court has consistently applied the long established

"principle of separability" noting that "the essential inquiry is whether the lawmaking body designed that the enactment should stand or fall as a unitary whole." *State v. Lanza,* 27 *N.J.* 516, 527 (1958). The inclusion of a severability clause in the statute, as is included in the Spill Act, will not necessarily resolve the issue completely. Such a clause will reverse the presumption that an act is only intended to "operate as an entirety. . . ." *Id.* at 528. However, the court must also determine whether the required severance would have been within the Legislature's intention or whether the Legislature would have concluded that "the particular provision is so interwoven with the invalid clauses so that it cannot stand alone." *Id.* at 527. The court must be able to say with assurance that "the Legislature would have intended the remainder of the statute to stand alone"; *Affiliated Distillers Brand Corp. v. Sills, supra* and would have enacted the statute without the offending clause. *Affiliated Distillers Brand Corp. v. Sills, supra.*

This test can be met "where the principle object of the statute is constitutional, and the objectionable provision can be excised without substantial impairment of the general purpose. . . ." *State v. Lanza, supra,* at 528. There must be no conflict between the purpose for which the Legislature originally enacted the statute and the statute as it remains with the offending portions excised. *N.J. Chapt., Am. J.P. N.J. State Bd. of Prof. Planners*, 48 *N.J.* 581, 593 (1967).

Finally, as earlier noted, when excising the invalid provisions, the courts must be cautious not to "usurp the legislative function of lawmaking." *Affiliated Distillers Brand Corp. v. Sills, supra*, at 346.

The Legislature adopted the Spill Act to protect the citizens and the environment of the State from harm resulting from discharge of petroleum and other hazardous substances. The Legislature specifically declared that it intended;

> . . .[b]y the passage of this Act to exercise the powers of this State to control the transfer and storage of hazardous substances and to provide liability for damage sustained within this State as a result of any discharge of

> said substances, by requiring the prompt containment and removal of such pollution and substances, and to provide a fund for swift and adequate compensation to resort businesses and other persons damaged by such discharge. [*N.J.S.A.* 58:10-23.11(a)]

From this introductory section alone, it is clear that the Legislature had numerous concerns which it intended to address through this act: the desire to minimize the chances for discharges of hazardous substances; the need for prompt action to remedy real or potential discharges; and the concern that individuals and businesses not be unfairly harmed by such discharges. The tax imposed by the Act is credited to the spill fund which is authorized to finance spill response and waste site cleanups, certain damages claims resulting from hazardous discharges, personnel and equipment costs of the DEP associated with enforcement of the Act, the administration of the spill fund and research concerning pollution and cleanup techniques, including ocean pollutions. *N.J.S.A.* 58:10-23.11(o). Thus, a primary object of the Spill Act, (and CERCLA) was to create a funding mechanism to finance as broad a response to the problem of actual and potential hazardous substance discharges in New Jersey as reasonably feasible.

The United States Supreme Court recognized the importance of the problem addressed by both the Spill Act and CERCLA and accordingly held that, "the State was entitled to *collect taxes*," to address the great risk to the public presented by discharges of hazardous substances, but that, "the State was not permitted to *spend* that money for any of the types of projects which EPA intended to finance," with superfund. Quite simply put, it was the nature of certain expenditures and not the tax collected to fund *all* the expenditures made and to be made from the fund in furtherance of the *overall* purposes of the Spill Act that the Court found to be objectionable. In their argument that the single unapportionable tax required by the Act renders it non-severable, plaintiffs overlook that important distinction drawn by the Court. While the tax cannot be apportioned, the preempted and non-preempted purposes and the expenditures made in furtherance thereof, are identifiable.

This Supreme Court found in *Schmoll v. Creecy*, 54 *N.J.* 194 (1969) that when a statute would be unconstitutional if applied to one set of facts, the courts should not stumble over, "mechanical terms, (but rather) the sounder course is to consider what is involved and decide from the sense of the situation whether the Legislature would want the statute to succumb." *Id.* at 202. There should be no doubt here, after reviewing the purposes of the statute and the intent of the Legislature, in light of the Supreme Court's findings, that as much of the Spill Act as is possible to survive, should survive.

In *State v. DeSantis*, 65 *N.J.* 462 (1974) the Court was faced with invalidating the State's obscenity statute or reading in to it several conditions which the United States Supreme Court had recently held must be a part of a constitutional obscenity statute. The Court decided to "judicially salvage" the statute, reading in the necessary conditions, even though to do so the Court would have to make some legislative policy decisions and even though the Legislature would have to completely rewrite the statute in the near future. *Id.* at 472-473. In this instance, the Spill Act will not necessarily need to be rewritten and the Court will not have to make any legislative policy decisions. The Court will only have to hold that the Act must be read in conjunction with §114(c) of CERCLA.

This matter is not dissimilar to *U.S.A. Chamber of Commerce v. State*, 89 *N.J.* 131 (1982) where The National Labor Relations Act (NLRA) was found to preempt the State's "Strikebreakers Act" to the extent that its provisions applied to employers and employees within the NLRA. Finding that the "legislature would likely want the statute to remain to the extent that it may . . . (and finding) no impediment to such judicial surgery as will bring the statute within the [Federal] Constitution," the Court read the necessary restrictions into the statue. *Id.* at 154 citing *State v. Zito*, 54 *N.J.* 206, 218 (1969). The same surgical procedures should be performed on the Spill Act.

In view of the foregoing it is submitted that the Court will not be usurping any legislative prerogative by deleting

the preempted purposes from the Spill Act. This reduced definition of the scope of the fund's authorization will not diminish the importance of the remaining portions of the statute. More importantly, the remaining purposes are in no way dependent on the excised portions. This Court suggests therefore that the authorization in the Spill Act for expenditures, beyond the State's share, for remedial costs for sites on the NPL and for removal costs that are eligible for superfund compensation under the terms of the NCP, should be severed.

Having found that the preempted/non-preempted provisions of the Spill Act may be severed, the question of refunds will now be addressed.

V. HAVE PLAINTIFFS COMPLIED WITH ALL JURISDICTIONAL REQUIREMENTS SO AS TO ENTITLE THEM TO CLAIM REFUNDS OF SPILL ACT TAXES?

N.J.S.A. 54:49-14 of the State Tax Uniform Procedure Law, provides:

> Any taxpayer, at any time within two years after the payment of any original or additional tax assessed against him, unless a shorter limit is fixed by the law imposing the tax, may file with the commissioner a claim under oath for refund, in such form as the commissioner may prescribe, stating the grounds therefore, but no claim for refund shall be required or permitted to be filed with respect to a tax paid, after protest has been filed with the commissioner or after proceedings on appeal have been commenced as provided in this subtitle, until such protest or appeal has been finally determined.

As it pertains to this issue the procedural history of this matter is as follows. On August 10, 1981, plaintiffs filed a complaint in the Tax Court seeking to have the Spill Tax declared unconstitutional and to obtain a refund for all taxes which were being paid. On April 23, 1982 the Tax Court granted the State's motion for summary judgment and dismissed all counts of plaintiffs' complaint which related to

the constitutionality of the Spill Act. This decision was affirmed by the Appellate Division and by the New Jersey Supreme Court. The United States Supreme Court reversed and remanded to the New Jersey Supreme Court which in turn remanded the matter to the Tax Court.

In early 1983, during the pendency of these lawsuits, plaintiffs filed claims for refund with the New Jersey Division of Taxation, which were denied by the Director of the Division. Each plaintiff filed a timely appeal in the Tax Court from denial of the claim for refund. No subsequent refund claims appear to have been filed. Since plaintiffs' 1983 refund claims cover only the periods stated in the claims, defendants contend that there are subsequent periods for which no refund claims were filed and which are now barred by the two-year statute of limitations contained in *N.J.S.A.* 54:49-14.

In a letter to the presiding judge of the Tax Court dated June 2, 1983, defendants presented the parties' joint request to place each of the appeals filed in 1983 on the inactive list pending the final disposition of the Tax Court decision. The issues raised were identical to those presented in the refund appeals, i.e. whether the Spill Act was preempted by CERCLA. These cases were placed on the inactive list where they still remain. Plaintiffs also claim that during an April 1986 conference with the presiding judge of the Tax Court, defendants represented that plaintiffs had complied with all procedural requirements and that that was not an issue.[9/]

In their brief in opposition to plaintiffs' motion for injunctive relief, dated September 8, 1986, defendants for the first time formally asserted that plaintiffs had failed to comply with all of the procedural requirements concerning their

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[9/] Defendants neither admit nor deny making such representation but claim that such a statement during an informal, off-the-record conference, cannot be binding.

The Court notes that in their April 1986 non-binding statements regarding legal issues, no reference was made to plaintiffs' alleged failure to abide by the requirements of *N.J.S.A.* 54:49-14.

refund claims.[10/] In a letter to plaintiffs' counsel dated September 10, 1986, the Division of Taxation notified plaintiffs concerning the alleged procedural deficiencies in the claims for refund and denied all refund claims.

Essentially plaintiffs claim that the refund statute language permits the filing of a single set of claims covering all subsequent periods. Plaintiffs argue that the phrase in *N.J.S.A.* 54:49-14, "but no claim for refund shall be required or permitted to be filed with respect to a tax paid, after protest has been filed with the Commissioner or after proceedings on appeal have been commenced as provided in this subtitle, until such protest or appeal has been finally determined," means that once a claim for refund is filed for a given two-year period, no other claims are required or permitted until the matter in controversy in the first refund claim is finally resolved.

Plaintiffs' interpretation overlooks the fact that each taxable period is viewed as separate and distinct from all other periods for purposes of compliance with jurisdictional requirements in tax matters. Jurisdiction to review one taxable year is not determinative of jurisdiction over other years. See *Clairol, Inc. v. Kingsley,* 109 *N.J. Super.* 22, 25 (App. Div. 1980), *aff'd.* o.b., 57 *N.J.* 199 (1970), app. dism'd. 402 *U.S.* 902 (1971); *Fairmount Cemetery Ass'n. v. Newark,* 3 *N.J.Tax* 370, 374 (Tax Court 1981). Construing the refund statute as plaintiffs would have it would completely subvert the principle that in tax matters jurisdictional requirements, specifically statutes of limitations, must be met for each taxable period.

Notwithstanding that conclusion I nevertheless find that plaintiffs are entitled to seek refunds, (from the NCP and NPL dates set forth in Point III). Although couched in terms of a "tax" refund, in view of the United States Supreme Court's finding that it was not the imposition and collection of the Spill Tax, but rather the expenditure of some of the

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[10/] In an earlier brief defendants alluded to the possible existence of such procedural defects.

monies on preempted purposes, that was improper, plaintiffs actually seek a return of those improperly spent funds. As such, *N.J.S.A.* 54:49-14 does not apply.[11/] Defendants do not disagree with the Supreme Court's finding. Defendants cannot have it both ways. They cannot adopt the "no tax" argument when it suits their needs in support of their position regarding prospectivity and severability, and adopt a "yes tax" position in an attempt to defeat plaintiffs' claims for refunds.

Secondly, notwithstanding defendants' claims that had they known the United States Supreme Court's decision regarding preemption beforehand, they would have devoted the preempted funds to non-preempted purposes, the fact is, as noted earlier, that some monies were expended on preempted purposes. But for those expenditures, it clearly appears that, with the continued payments of the tax by plaintiffs, the statutory cap, (*N.J.S.A.* 58:10-23.11h(b)) would have been reached and the subsequent payments would never have been made. Under those circumstances defendants should not be permitted to take refuge behind the procedural requirements of *N.J.S.A.* 54:49-14.

Lastly, if ever there was a situation where fundamental fairness should allow a party to at least pursue a refund claim, this is it.

VI. IN WHAT MANNER SHALL PLAINTIFFS BE REFUNDED THOSE SUMS EXPENDED ON PREEMPTED PURPOSES?

Initially, defendants argue that plaintiffs are entitled to no refund because they cannot prove that they would have been assessed less tax, or no tax at all, but for the preempted provisions of the Spill Act; that is, they cannot show that all of the taxes would not have been spent for non-preempted purposes if the Supreme Court's decision had been available

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[11/] In spite of this finding it was deemed wise to include the foregoing discussion concerning the interpretation of the requirements of *N.J.S.A.* 54:49-14 in the event the Supreme Court disagrees with this finding and concludes that the statute does apply.

earlier. Thus plaintiffs cannot show that they suffered any harm from the constitutional defects in the Spill Act. Defendants argue that the hazardous substance discharge problem in New Jersey is of sufficient scope to justify expenditure of *all* Spill Tax revenues collected to date. That some of those monies may have been spent for preempted purposes can be viewed as an historical accident resulting from the State's reasonable reliance on its interpretation of the law. Had the law been clear, according to defendants, there is no doubt that all of the Spill Tax revenues would have been used for non-preempted purposes. Accordingly defendants contend that plaintiffs have suffered no specific financial harm and are entitled to no financial remedy. In sum, defendants claim that the equities favor them since the plaintiffs would have paid the full amount of taxes even if preempted spending had not been made. They claim that if they had known that preemption would have been ultimately declared, they would have spent the money on other things. The simple answer, as previously noted, is that they did not do this. Preemption has been declared; taxpayers' money was spent for preempted purposes; and those taxpayers are presumably entitled to a measure of relief.

As previously noted § 114(c) of CERCLA states that a special tax cannot be collected for certain uses; it does not preclude the collection of the tax for valid uses nor does it prohibit general revenues or other monies from being spent for preempted uses. Accordingly had the high court found that it was the *collection* of the tax that was improper, this Court should direct repayment of the taxes to the taxpayers in the same proportion as the taxes were paid. However it was the *expenditure* for preempted purposes that was found to be improper. If that preempted spending had not occurred, (it did) and if those monies were spent on non-preempted purposes, (they were not), as earlier noted, it appears that the amount of money paid into spill fund would have exceeded the $35,000,000 cap set by the Legislature and the tax would have been suspended on its own accord. *N.J.S.A.* 58:10-23.11h(b).

Because it was the expenditure for preempted purposes that was improper, the court should allow defendants the

opportunity to compute the amount of those expenditures paid for work performed and material purchased after promulgation of the NCP (July 16, 1982) and the NPL (September 8, 1983). Such task, as noted earlier, will be difficult. Possibly a hearing may have to be conducted to determine the amount in question. Thereafter the Legislature should be permitted a reasonable period of time to reimburse the spill fund for the amount of preempted expenditures made.[12/] Reimbursement will make plaintiffs whole because the constitutional infirmity and plaintiffs' financial harm resulted from the improper *expenditure* of spill fund revenues and not the *collection* of the tax per se. Reimbursement cures the improper depletion of the fund because all of these monies collected will again be in the fund for future commitment to proper uses. Plaintiffs will not have suffered any economic harm once the spill fund has been reimbursed and thus will be entitled to no refund.

Failure to make timely reimbursement should entitle plaintiffs to a refund of the improperly expended amounts. Any excess in the fund resulting from such reimbursement should also be refunded. In either event the refund to the individual plaintiffs should be in proportion to the tax each paid to the total tax collected.

VII. SHOULD PLAINTIFFS' MOTION TO ENJOIN DEFENDANTS FROM ENFORCING COLLECTION OF THE SPILL TAX BE GRANTED?

In their original complaints to the Tax Court, plaintiffs sought, *inter alia,* an injunction restraining defendants from attempting to enforce the collection of taxes under the Spill Act. The United States Supreme Court has ruled on the merits of the case and declared that to the extent the Spill Act permits taxation to support preempted expenditures it cannot

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12/ As previously noted general revenues may be devoted to preempted uses. Similarly the State is free to recover these expenditures from the responsible parties. *N.J.S.A.* 58:10-23.11g(c). Possibly any balance of the $100,000,000 bond issue for hazardous waste cleanup, P.L. 1981, c. 175, may be used to replenish the fund.

stand. Accordingly plaintiffs argue that to continue to impose the Spill Tax at the rate established to support the cleanup of all hazardous waste sites, including preempted superfund sites, is in clear violation of § 114(c) and the mandate issued by the Supreme Court. Citing *Keuper v. Wilson,* 111 *N.J. Super.* 502, 505-06 (Ch. Div. 1970), plaintiffs argue that where there has been a prior adjudication that the State has violated plaintiffs' rights, the acts of State officials in contravention of such adjudication should be enjoined.

The fundamental error in plaintiffs' position, both as expressed in their request for injunctive relief and in this remand proceeding generally, is that the United States Supreme Court, contrary to plaintiffs' belief, did not strike down the spill fund tax *per se* but only to the extent that tax monies were expended for preempted purposes. Thus, if plaintiffs' tax monies are being spent for non-preempted purposes, which defendants allege is, and has been the case, since the date of the Supreme Court's opinion, plaintiffs have no cause to complain and must continue to pay the tax. While plaintiffs are free to disagree with this view, their recourse is not injunctive relief.

Furthermore plaintiffs are adequately protected against any irreparable harm. Irreparable harm sufficient to entitle an applicant to either temporary or permanent injunctive relief is a harm that cannot be adequately redressed by monetary damages. *Crowe v. DeGioia,* 90 *N.J.* 126, 132-3 (1982) (stating standard to obtain temporary injunction); *Board of Ed. of Union Beach v. N.J. Ed. Ass'n.,* 96 *N.J. Super.* 371 (Ch. Div. 1967), aff'd. 53 *N.J.* 29 (1968) (stating standard for permanent injunctive relief). Since the harm which plaintiffs will have allegedly suffered is the improper expenditure of legal tax monies, that harm can be redressed by repaying such monies in the form of refunds or reimbursement to the fund as the case may be. Plaintiffs' harm is thus purely pecuniary and not irreparable.

Moreover, for an applicant to obtain either temporary or permanent injunctive relief, the court must be at least somewhat persuaded of the correctness of the applicant's claim. Until a determination is made as to the monies

expended for work and materials after the NCP and NPL triggering dates, the Court is not persuaded in favor of either party's chance of success.

Finally, when the relative hardships to the parties are considered, it is apparent that plaintiffs do not meet the test. Plaintiffs are clearly able to pay current spill fund tax assessments. On the other hand, the State needs plaintiffs' spill fund tax monies to fully fund its vast cleanup operations which have not been preempted by CERCLA (see Catania Affid. par. 2 to 5). Moreover, should plaintiffs prevail the State will abide by that final judicial decision, and a permanent injunction will be unnecessary.

An injunction should not issue.

SUMMARY

Pursuant to the Supreme Court's remand, the undersigned submits the following recommendations.

1. The decision of the United States Supreme Court should not be applied prospectively but should be retroactive to July 16, 1982 with respect to expenditures made on preempted removal purposes and to September 8, 1983 as to preempted remedial expenses.

2. The non-preempted purposes of the Spill Act are severable from the purposes found to be preempted by the United States Supreme Court.

3. Plaintiffs' claims for refunds should not be defeated by reason of their failure to comply with the procedural requirements of *N.J.S.A.* 54:49-14.

4. Following an accounting, (and plenary hearing if necessary) to determine the amount of monies paid for material purchased and services rendered for preempted removal purposes on or after July 16, 1982 and for preempted remedial purposes on or after September 8, 1983 to March 10, 1986, (date of the United States Supreme Court decision), the Legislature should be permitted a reasonable period of

time to reimburse the fund for the preempted amounts expended.

(a) If, following such reimbursement, the amount of the fund exceeds the cap established by the Legislature, such excess should be paid to plaintiffs.

(b) Should the required reimbursement not be made, the amount of preempted expenditures should be refunded to plaintiffs.

(c) Such refunds should be made in proportion to the tax paid by each plaintiff to the total tax collected.

5. Defendants should not be enjoined from enforcing payment of the spill fund tax by plaintiffs.

Respectfully submitted,

/s/ John F. Evers
JOHN F. EVERS, J.T.C.

/cf
Oct. 24, 1986

APPENDIX H

SUPREME COURT OF NEW JERSEY
September Term 1984

A-66

EXXON CORPORATION, *et al.*,

Plaintiffs-Appellants,

v.

ROBERT HUNT, ADMINISTRATOR OF
NEW JERSEY SPILL COMPENSATION FUND, *et al.*,

Defendants-Respondents.

[Filed Apr. 3, 1986]

ORDER

This matter having been remanded to this Court by the Supreme Court of the United States for further proceedings consistent with its mandate, and good cause appearing;

It is ORDERED that this matter is hereby remanded to the Tax Court to develop a record and make such recommended findings and calculations as may be determined to be necessary to implement the mandate of the Supreme Court; and it is further

ORDERED that report of the Tax Court shall be filed with the Clerk of this Court within 60 days of the filing date of this Order.

Jurisdiction over this matter is otherwise retained.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 1st day of April, 1986.

/s/ Stephen W. Townsend
Clerk of the Supreme Court

APPENDIX I

UNITED STATES OF AMERICA, SS:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable the Justices of the Supreme Court of New Jersey,

GREETINGS:

WHEREAS, lately in the Supreme Court of New Jersey, there came before you a cause between Exxon Corporation, The BF Goodrich Company, Union Carbide Corporation, Monsanto Company and Tenneco Chemicals, Inc., Plaintiffs-Appellants, and Robert Hunt, Administrator of New Jersey Spill Compensation Fund; Clifford A. Goldman, Treasurer of the State of New Jersey; Sidney Glaser, Director of the Division of Taxation, Jerry F. English, Commissioner of Environmental Protection, and the State of New Jersey, Defendants-Respondents, No. 21,567, wherein the judgment of the said Supreme Court was duly entered on the nineteenth day of September, 1984, as appears by an inspection of the transcript of the record from the said Supreme Court which was brought into the SUPREME COURT OF THE UNITED STATES as provided by Act of Congress.

AND WHEREAS, in the 1985 Term, the said cause came on to be heard before the SUPREME COURT OF THE UNITED STATES on the said transcript of record and was argued by counsel.

ON CONSIDERATION WHEREOF, it was ordered and adjudged on March 10, 1986, by this Court that the judgment of the above court in this cause is affirmed in part and reversed in part, with one-half of the total costs to be taxed against the appellees therein, and that this cause is remanded to the Supreme Court of New Jersey for further proceedings not inconsistent with the opinion of this Court.

IT WAS FURTHER ORDERED that the appellants, Exxon Corporation, et al., recover from Robert Hunt, Administrator of New Jersey Spill Compensation Fund, et al. One Thousand Five Dollars and Thirty-four Cents ($1,005.34) for their costs herein expended.

NOW, THEREFORE, THE CAUSE IS REMANDED to you in order that such proceedings may be had in the said cause, in conformity with the judgment of this Court above stated, as accord with right and justice, and the Constitution and Laws of the United States.

Witness the Honorable WARREN E. BURGER, Chief Justice of the United States, the 9th day of April in the year of our Lord one thousand nine hundred and eighty-six.

Costs of Exxon Corporation, et al.

Printing of record:	$1,710.68
Clerk's costs:	*300.00*
TOTAL:	$2,010.68

/s/ Joseph F. Spaniol, Jr.
JOSEPH F. SPANIOL, JR.

Clerk of the Supreme Court of the United States

No. 84-978

Exxon Corporation, et al.

v.

Robert Hunt, Administrator of New Jersey Spill Compensation Fund, et al.

APPENDIX J

EXXON CORPORATION
Affiliates and Subsidiaries
(Not Wholly-Owned)*

AGA Progas a.s
AT&S Exploration Ltd.
Abu Dhabi Petroleum Company Limited
Ace Polymer Co., Ltd.
Acquifund Resources Limited
Aditivos Orinoco, C. A.
Adria-Wien Pipeline Gesellschaft mit beschrankter Haftung
Advanced Elastomer Systems Do Brasil Ltda.
Advanced Elastomer Systems Japan Limited
Advanced Elastomer Systems Limited
Advanced Elastomer Systems Marketing Pte. Ltd.
Advanced Elastomer Systems NV/SA
Advanced Elastomer Systems Singapore Pte. Ltd.
Advanced Elastomer Systems, Canada, Inc.
Advanced Elastomer Systems, Inc.
Advanced Elastomer Systems, L.P.
Air Tankdienst Koeln GbR
Aircraft Fuel Supply B. V.
Aishin Sekiyu K. K.
Al-Jubail Petrochemical Company
Alberta Products Pipe Line Ltd.
Alyeska Pipeline Service Company
AquaAir Environmental, Inc.
Aramco Services Company
Asakawa Sekiyu K.K.
Atlas Supply Company of Canada Limited
Awaji Gas Nenryo Kabushiki Kaisha
Azuma Sekiyu K.K.
B.W.O.C., Inc.
BEB Erdgas und Erdoel GmbH, Hannover
BRIGITTA Erdgas und Erdoel GmbH, Hannover

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* **Does not include companies with less than 5% Exxon Ownership.**

Bangkok Aviation Fuel Services Limited
Banshu Ekika Gas K.K.
Bayerische Erdoelleitung G.m.b.H.
Beaverhill Resources Limited
Brickwood Holdings Pty. Ltd.
Bryan Austin Chalk Operating Committee, Inc.
Bryan Woodbine Gathering, Inc.
Canadian Reserve Oil & Gas Ltd.
Cascade Fertilizers (1990) Limited
Castle Peak Power Company Limited
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Changi Into-Plane Services (Pte) Ltd.
Chuo Sekiyu Hanbai K.K.
Clermont Coal Mines Limited
Comcor Chemicals Limited
Compagnie Industrielle des Polyethylenes de Normandie, GIE
Compania Minera Disputada de Las Condes S.A.
Comptoir Auxiliaire du Petrole
Comptoir Oyonnaxien des Combustibles (C.O.C.)
Computer Centrum Groningen B.V.
Copim St. Lawrence Ltd.
Cynthia Gas Gathering Company Limited
DFTG Deutsche Fluessigerdgas Terminal GmbH
Daihatsu Sekiyu K.K.
Daito Gas K.K.
Depot Petrolier du Gresivaudan
Depots Petroliers de la Corse
Depots de Petrole Cotiers
Deudan-Holding GmbH
Deutsche Advanced Elastomer Systems GmbH
Deutsche Erdgas Transport G.m.b.H.
Deutsche Transalpine Oelleitung G.m.b.H.
Devon Estates Limited
Dexco Polymers (General Partnership)
Disma S.r.l
Dixie Pipeline Company
Dunbar Oil Ltd.
E S F Limited
ESSO OIL Tankstellen Gesellschaft m.b.H.
ETD Tankdienst Gesellschaft Duesseldorf GbR
Eagle Kenso K.K.

Eagle Reinsurance Co. Ltd.
East Texas Salt Water Disposal Company
Eiko Sekiyu K.K.
Elwerath Erdgas und Erdoel GmbH, Hannover
Elwerath Erdoel und Erdgas AG
Emirates National Chemicals Company Ltd.
Emori Sekiyu K.K.
Emsland-Erdoelleitung G.m.b.H.
Emulsions de Feyzin
Emulsions du Dauphine
Energie Marketing Service GmbH
Entrepot Petrolier de Mulhouse (E.P.M.)
Entrepot Petrolier de l'Aveyron (E.P.A.)
Erdgas-Verkaufs-Gesellschaft m.b.H.
Erdoel-Raffinerie Deurag-Kerag GmbH
Esso (Overseas) Pension Trust Limited
Esso Energie G.I.E.
Esso Exploration and Production Angola Inc. (4)
Esso Exploration and Production Ireland Limited
Esso Lub' Services
Esso Malaysia Berhad
Esso Raffinage S.A.F.
Esso Resources Properties Inc.
Esso Societe Anonyme Francaise
Esso Standard Thailand Ltd.
Esso Standard Tunisie S. A.
Esso Technologies et Services (E.T.S.)
Etablissements Cloarec
Exxon Asset Funding Company
Exxon Asset Management Company
Exxon Chemical Asset Management Partnership
Exxon Chemical France
Exxon Chemical Paraffins Limited
Exxon Chemical Polymeres SNC
Exxon Supply Company
Exxon de Colombia S.A.
F. T. Giken Kabushiki Kaisha
Federated Pipe Lines Ltd.
Ferngas Nordbayern G.m.b.H.
Ferngas Salzgitter GmbH
Fernkaelte Geschaeftsstadt Nord G.b.R.
Flughafen Schwechat Hydranten-Gesellschaft

Fuji Kogyo K.K.
Full Cycle Plastics Pty. Ltd.
G16a (Groep) B.V.
Gasunie Engineering B.V.
General Bussan K.K.
General Highway K.K.
General Petrochemical Industries Limited
General Sekiyu K.K.
General Sekiyu Okinawa Hanbai K.K.
General Sekiyu Overseas, Ltd.
General Shipping Co. Ltd.
General Unyu Kabushiki Kaisha
Geobutane-Lavera
Gewerkschaft Brassert Erdoel und Erdgas GmbH
Gewerkschaft Gute Hoffnung Erdgas und Erdoel GmbH
Gewerkschaft Kuechenberg Erdgas und Erdoel GmbH
Glen Park Gas Pipe Line Company Limited
Grande Ecaille Land Company, Inc.
Groupement Immobilier Petrolier
Groupement Liants Routiers du Gard Esso-Viafrance (G.L.R.G.E.)
Groupement Petrolier Aviation
Groupement Petrolier de Nantes (G.P.N.)
Groupement Petrolier de la Cote d'Azur
Groupement Petrolier du Finistere G.I.E.
Groupement Petrolier du Val-de-Name (G.P.V.N.)
Groupement d'Exploitation du Depot de Reception de Channevie
Hambrecht & Quist Environmental Technology
Hamburger Gaswerke GmbH
Hannoversche Erdoelleitungs-G.m.b.H.
Hanshin Kyowa Sekiyu K.K.
Hayakawa Sekiyu K.K.
Heinrich Schneider Spedition GmbH
Hiroshima General Gas Juten Kabushiki Kaisha
Hoei Sekiyu K.K.
Hokkai Sanshi Co., Ltd. (Chemical)
Hokushin Bussan K.K.
Hokuyu Sekiyu K. K.
Hong Kong Pumped Storage Development Company, Limited
Houston Regional Monitoring Corporation

Hydrant Refuelling System, S.A.
Hydranten-Betriebs-Gesellschaft, G.b.R.
Hydrierwerke Poelitz Aktiengesellschaft
Imperial Oil (an Ontario Partnership)
Imperial Oil Limited /
Imperial Oil Resources Limited/Petroliere Imperiale Ressources Limitee
Imperial Oil Resources M.V.T. Limited
Imperial Oil Resources Ventures Limited
Imperial Oil Resources an Alberta limited partnership
Imperial Pipe Line Company, Limited, The
Inada Ekka Gas Kabushiki Kaisha
Industria Acqua Siracusana S.p.A.
Industry Promotion Enterprises Limited
Intoplane Services Company Limited
Iranian Oil Participants Limited (Iranian Consortium)
Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited
Iraq Petroleum Pensions, Limited
Japan Butyl Company Limited
Japan Coal Liquefaction Development Company, Ltd.
Jaymo SNC
Jersey Nuclear-Avco Isotopes, Inc.
K. K. Momose Shiojiri Stand
K. K. Toresan
K.K. Aizu General
K.K. Auto
K.K. Daimaru
K.K. Eastern Gas Terminal
K.K. General Sekiyu Hanbaisho
K.K. Genet
K.K. Genetech
K.K. Heian Sekiyu
K.K. Kyoei Shosha
K.K. Marugo Izumasa Shoten
K.K. Marutaka Sekiyu
K.K. Momose Sekiyu
K.K. Saidaiji Gas
K.K. Standard Sekiyu Osaka Hatsubaisho
K.K. Toko
K.K. Uwano Sekiyu Shokai

K/S Statfjord Transport A/S & Co.
KX Industries, L.P.
Kabushiki Kaisha Sankyo Plastics
Kai Tak Refuellers Company Limited
Kanto Kygnus K.K.
Karlsruhe-Stuttgart Rohrleitung Gesellschaft mbH
Kawasaki Kygnus Sekiyu Hambai Kabushiki Kaisha
Keihan Seikyu K.K.
Keiyo Sekiyu Hanbai K.K.
Kemcor Australia Pty. Ltd.
Kemcor Elastomers Ltd.
Kemcor Olefins Ltd.
Kemcor Plastics Pty. Ltd.
Kenya Petroleum Refineries Limited
Kibo Sekiyu Hanbai K.K.
Kimura Sekiyu Kabushiki Kaisha
Kinwa Sekiyu K.K.
Kobe Standard Sekiyu K. K.
Korea Perchem Company Limited
Kosxon Chemical Company Limited
Kowa Sekiyu K.K.
Kowloon Electricity Supply Company Limited
Kumho E.P. Rubber Co., Ltd.
Kygnus Ekika Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Marketing Service K.K.
Kygnus Sekiyu K. K.
Kygnus Sekiyu Seizei Kabushiki Kaisha
Kygnus Trading Kabushiki Kaisha
Kyushu Eagle K.K.
L12A (Groep) B.V.
L12B/L15B (Groep) B.V.
L14 (Groep) B.V.
L15A (Groep) B.V.
L2 (Groep) B.V.
L5a (Groep) B.V.
LEAG Aktiengesellschaft fuer luzernisches Erdoel
Les Docks des Petroles d'Ambes
Lients Routiera de la Vailee de la Loire (LRVL)
Lilac Sekiyu Kabushiki Kaisha
Lily Sekiyu K.K.
Lithcon Petroleum International (Bahamas) Inc.

Lithcon Petroleum Taiwan Inc.
Long Beach Oil Development Company
MEGAL FINCO
MEGAL GmbH
MESBIC Financial Corporation of Houston
Maasvlakte Olie Terminal N.V.
Magota Sekiyu K.K.
Mainline Pipelines Limited
Malaysian Energy Chemical & Services Sdn Bhd
McCann Plastics Inc. (Chemical)
McColl-Frontenac Inc.
McColl-Frontenac Petroleum Inc./Petroliere McColl-Frontenac
Meiji Sekiyu K.K.
Metro Fuel Co. Ltd.
Mikawa Bussan K.K.
Mitake Unso K.K.
Mittelrheinische Erdgas Transport Gesellschaft mit beschrankter Haftung
Mode Wheel Property Limited
Montreal Pipe Line Limited/Les Pipe-Lines Montreal Limitee
Mount Thorley Coal Loading Limited
Mr. Lube Canada Inc.
Multi Tank Card B.V.
Mytex Polymers (General Partnership)
N. V. Nederlandse Gasunie
NAM-K 14 B.V.
NAM-K 15 B.V.
NAM-K 7 B.V.
NAM-K 17 B.V.
NAM/CLOMS-K 8/K 11 B.V.
NAM/CLOMS-L 13 B.V.
NAM/MOBIL N9a B.V.
NPC Services, Inc.
Nakabayashi Sekiyu K.K.
Nansei Oil Terminal K.K.
Nansei Sekiyu Kabushiki Kaisha
Nanseki Kaihatsu K.K.
Native Venture Capital Co. Ltd.
Near East Development Corporation
Nederlandse Aardolie Maatschappij B. V.

Neptune Bulk Terminals (Canada) Ltd.
New Cure, Inc.
Newcastle Coal Shippers Pty. Limited
Nichiei Kogyo Kabushiki Kaisha
Nichimo Oil (Bermuda) Co., Ltd.
Nikko Sangyo K.K.
Nippon Unicar K.K.
Nisku Products Pipe Line Company Limited
Nissei Sekiyu Kabushiki Kaisha
Nogat B.V.
Norddeutsche Erdgas-Aufbereitungs G.m.b.H.
Norddeutsche Mineraloelwerke Stettin G.m.b.H.
Nordrheinische Erdgas Transport Gesellschaft
mit beschrankter Haftung
Noroxo
Northward Developments Ltd.
OSLO Alberta Limited
Office Prive d'Assurances et de Courtages
Oil Field Chemicals Company (Saudi Arabia) Ltd.
Oil Service Company of Iran (Private Company)
Oil Spill Response Limited
Oldenburgische Erdoel Gesellschaft m.b.H.
Oleoducto de Colombia S.A.
Oleoductos Canarios, S.A.
Osaka General Gas K.K.
Osaka Kygnus K.K.
P. T. Stanvac Indonesia
P.A.C. S.A.R.L. (Pinson-Allegret-Causse)
PINEC Inc.
Pacesetter Enterprises Limited
Pars Investment Corporation
Paxon Polymar Company, L.P.
Peninsula Electric Power Company Limited
Petroleum Services (Middle East) Limited
Petrosvibri S.A.
Pier Atlantic Limited
Pipe Line Services, Inc.
Plantation Pipe Line Company
Portland Pipe Line Corporation
Primaeroel GmbH
Primus a.s
Prince William Sound Oil Spill Response Corporation

Progas Limited
Projectbureau W/K B.V.
Quadrant Gas Limited
Raffinerie du Midi S.A.R.L.
Rainbow Pipe Line Company, Ltd.
Redwater Water Disposal Company Limited
Refineria Petrolera Acajutla, S. A.
Regulus Holding (Singapore) Pte. Ltd.
Rheingas Erdgasleitungs-Gesellschaft m.b.H.
Rotterdam Antwerpen Pijpleiding (Belgie) N.V.
Rotterdam-Antwerpen Pijpleiding (Nederland) N.V.
Rubiatec Sandirian Berhad
Ruhrgas Aktiengesellschaft
S.A. du Pipeline a Produits Petroliers sur Territoire Geneve (SAPPRO)
SEAG Aktiengesellschaft fuer schweizerisches Erdoel
SERAN S.p.A.
Saitama Sekiyu Hanbai K.K.
Sanyo Sekiyu K.K.
Saraco S. A.
Saudi Arabian Lube Additives Company Limited
Schubert KG
Seismic Industries A/S
Senpoku Oil Service K.K.
Servacar Ltd.
Shehtah Drilling Limited
Shimoyama Sekiyu K.K.
Shin-Nihon Yukagaku Kogyo K.K.
Shinohara Oil K.K.
Sigel Corporation
Smiley Gas Conservation Limited
Sociedad Nacional de Oleoductos Ltda.
Sociedad de Inversiones de Aviacion
Societa Italiana per l'Oleodotto Transalpino S.p.A.
Societa per Azioni Raffineria Padana Olii Minerali-SARPON
Societe "Geomines-Caen"
Societe Anonyme "Produits Lubrifiants de Madagascar"-PROLUMA S.A.
Societe Anonyme de Gastion de Stocks de Securite (SAGESS)
Societe Anonyme de la Raffinerie des Antilles

Societe Anonyme des Hydrocarbures
Societe Civile de Mustapha Algerie
Societe Civile de Participation pour la Destruction des Dechets Industriels (SOCDI)
Societe Esso de Recherches et d'Exploitation Petrolieres Esso Rep
Societe Francaise EXXON CHEMICAL
Societe Havraise de Nanutention de Produits Petroliers
Societe Ivoirienne d'Operations Petrolieres S.A.
Societe Malgache de Raffinage
Societe Paris-Manche
Societe Paris-Niel
Societe Reunionnaise d'Entreposage
Societe d'Etude et d'Exploitation de la Raffinerie du Tchad - S.E.E.R.A.T.
Societe d'Exploitation & de Developpement d'Operations Commerciales
Societe d'Exploitation des Garages Les Stations Tour Eiffel
Societe de Manutention de Carburants Aviation (S.N.C.A.)
Societe de Promotion et de Financement Touristique (CARTHAGO)
Societe de la Raffinerie d'Alger
Societe des Pipe-Lines de Strasbourg
Societe des Transports Petroliers par Pipe Line
Societe du Caoutchouc Butyl (SOCABU)
Societe du Pipe Line de la Raffinerie de Lorraine
Societe du Pipe-Line Mediterranee-Rhone
Societe du Pipeline Sud-Europeen
Socony-Standard-Vacuum Oil Company (Petroleum Maatschappij)
Southern Natural Gas Development Pty. Ltd.
Spintek Systems, L.P.
Standard Kaihatsu K.K.
Standard Kosan Kabushiki Kaisha
Standard Service K.K.
Standard Fuelling Company Limited
Statfjord Transport A/S
Stockage Geologique de Gaz de Lavera
Sueddeutsche Erdgas Transport Gesellschaft mit beschrankter Haftung
Sun East (Dublin) Company Ltd.

Sun East Company Ltd.
Superior Disk Corporation
Syncrude Canada Ltd.
Synergistics Industries (NJ) Inc.
Synergistics Industries (TX) Inc.
Synergistics Industries Limited
TAR-Tankanlage Ruemlang AG
TBN Tanklager-Betriebsgesellschaft Nuernberg mbH
TCA Plastics Inc.
TFS Turbo Fuel Services GmbH, Hamburg
TGF Tankdienst Gesellschaft Frankfurt G.b.R.
TGM Tankdienst-Gesellschaft Muenchen GbR
TIBA Speditions GmbH
TLS Tanklager Stuttgart GmbH
Taihei Bussan K.K.
Taisei Kogyo Sekiyu Hanbai K.K.
Taketsuru Yugyo K.K.
Tankanlage A. G., Mellingen
Tanklager Altishausen A. G.
Tanklager Taegerschen AG
Tanklager-Gesellschaft Tegel G.b.R.
Tanklagergesellschaft, Koeln-Bonn G.b.R.
Tecnica Quimica Petrolera, S.A. de C.V.
Terminal Petrolier de Bordeaux (T.P.B.)
Thai Aliphatics Company Limited
Thai C-Center Company Limited
Thai Petroleum Pipeline Co., Ltd.
Thyssengas G.m.b.H.
Tohpren Co., Ltd. (Chemical)
Tojo Gas K.K.
Toko Sekiyu K.K.
Tonen Chemical Nasu Co., Ltd.
Tonen Energy International Corp.
Tonen Energy and Marine (Singapore) Pte. Ltd.
Tonen Filare Co. Ltd.
Tonen Film Company Limited
Tonen Kabushiki Kaisha
Tonen Kagaku K.K.
Tonen Properties Inc.
Tonen Sogo Service Co., Ltd.
Tonen System Plaza Kabushiki Kaisha
Tonen System Service Kabushiki Kaisha

Tonen Tanker Kabushiki Kaisha
Tonen Tapyrus Company Limited
Tonen Technology K. K.
Tonex Company Limited
Towa Compounding Co., Ltd.
Towa Sekiyu K.K.
Toyo Gas K.K.
Toyoshina Film Company, Ltd.
Trans-Northern Pipelines Inc.
Transalpine Oelleitung in Oesterreich Gesellschaft m.b.H.
Transgaz Lavera
Tsurumaru Unyu K.K.
Turkish Petroleum Company, Limited
UBAG-Unterflurbetankungsanlage Flughafen Zurich
Ulan Coal Mines Limited
United Industry Development Co., Ltd.
Van Salt Water Disposal Company
Verbundnetz Gas AG
Wako Jushi Kabushiki Kaisha
Wartempomp Nederland B.V.
Westdeutsche Erdoelleitungs-G.m.b.H.
Westgas G.m.b.H.
Winnipeg Pipe Line Company Limited
Woodbine Marketing Co., Inc.
Worex S.N.C.
Yasaka Sekiyu K.K.
Yellowstone Pipe Line Company
Yoshimi Gas Kabushiki Kaisha
Yumi Sekiyu K.K.
Zenon Environmental Systems Inc. (ZESI)

THE BF GOODRICH COMPANY
Affiliates and Subsidiaries
(Not Wholly Owned)

B.F. Goodrich Aerospace Asia-Pacific, Ltd.
Chemdet Pty.
DTM Corporation
Simmonds Precision Engine Systems
Telenor, S.A.
The Geon Company

UNION CARBIDE CORPORATION
Affiliates and Subsidiaries
(Not Wholly-Owned)

Ace Limited
Ace Polymer Company, Limited
ACM Services, Inc.
Agri-Diagnostics Associates
Agromore, Ltd.
Alberta & Orient Glycol Company Limited
Asia Pacific Microballoons Sdn. Bhd.
Asia Pacific Phenolics Sdn. Bhd.
C&M Finance and Trading B.V.
Carbographite Limited
Clark Chemical Industry Company, Ltd.
Commercial Alcohols Limited
Elektrode Maatskappy Van Suid-Afrika (Eiendoms) Beperk EMSA
Hokuetsu Kasel (Chemical) Co., Ltd.
Hokuetsu Kasel Shji (Trading) Co., Ltd.
International Diagnostic Systems Corp.
Kyowa Shokai Co., Ltd.
Nepal Battery Company Limited
Nikki-Universal Co., Ltd.
Nippon Unicar Company Limited
Osaka Hokuetsu Kasel Co., Ltd.
Parylene Japan K.K.
Petromont Inc. (Management Company)
Poly Pack
Sankyo Plastics Co., Limited
Shanghai Guang Yang Shoes Co.
Shanghai UCC-UOP Molecular Sieve Co., Ltd.
Shawinigan Pipeline Reg'd.
Suzhou Su Hong Craft Shoes Co.
Tenngasco Gas Gathering Company
Thalassa Produtos Quimicos Ltda.
Thermo
Tsuda Wire & Cable
UCAR Carbon Canada Inc
UCAR Carbon Company Inc
UCAR Carbon France S.A.
UCAR Carbon Mexicana, S.A. de C.V.

UCAR Carbon Navarra S.A.
UCAR Carbon S.A.
Union Carbide (Guangdong Zhongshan) Company Limited
Union Carbide-Hecia Joint Venture
Union Carbide-Rajah Joint Venture
Union Carbide Argemtoma S.A.I.C.S.
Union Carbide Benelux N.V.
Union Carbide Commercial Chile Ltda.
Union Carbide India Limited
Union Carbide Investimentos e
Union Carbide Lanka Limited
Union Carbide Marble Care, Inc
Union Carbide Pakistan (Private) Limited
Union Carbide Productos Quimicos Litda.
Union Polymers Sdn. Bhd.
Union Showa K.K.
UOP Management Services (Saudi Arabia) Ltd.
Visking do Brasil S.A.
Vitaphore Wound Healing
Wako Jushi Co., K.K.
White Martins Productos de Carbono S.A.

MONSANTO COMPANY
Affiliates and Subsidiaries
(Not Wholly-Owned)

Advanced Elastomer Systems, Canada, Inc.
Advanced Elastomer Systems do Brasil Ltda.
Advanced Elastomer Systems, Inc.
Advanced Elastomer Systems Japan Limited
Advanced Elastomer Systems Limited
Advanced Elastomer Systems, L.P.
Advanced Elastomer Systems NV/SA
Advanced Elastomer Systems Singapore Pte. Ltd.
Advent Eurofund Ltd.
Continental Fisons S.A.
Deutsche Advanced Elastomer Systems GmbH
Euro Aspartame, S.A.
G.D. Searle (Philippines) Inc.
HybriTech Europe SNC
Korag Company Limited
Korea Pharma Holding Company Limited

Kumho Monsanto Inc.
Lorex Pharmaceuticals
Monsanto Kasei Company
Monsanto (Malaysia) Sdn. Bhd.
Monsanto Premier Kasei Co., Limited
Montor Performance Plastics Co.
NutraSweet AG
Optical Diamond Products, Inc.
P.T. Monagro Kimia
P.T. Sriwijaya Pakun Sejati
Sanitas
Schiapparelli-Searle S.r.l.
Searle (Bangladesh) Limited
Searle Ciba-Geigy Korea Ltd.
Searle Pharma Limited
Searle Yakuhin K.K.
Synexus S.A.
Unistar S.A.

Supreme Court, U.S.
FILED
OCT 25 1993
OFFICE OF THE CLERK

(2)

No. 93-288

In the

Supreme Court of the United States

October Term, 1993

Exxon Corporation, the BF Goodrich Company, Union Carbide Corporation, and Monsanto Company,
Petitioners,

v.

Susan B. Boyle, Administrator of the New Jersey Spill Compensation Fund, et al.,
Respondents.

On Petition For a Writ Of Certiorari To The Appellate Division Of The New Jersey Superior Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Are petitioners entitled to have this matter reviewed by this Court a second time when the New Jersey Courts have given full effect to the mandate of this Court in Exxon v. Hunt, 475 U.S. 355 (1986), by requiring the State Legislature to reimburse the Spill Fund for expenses partially preempted by Superfund, a remedy which is entirely consistent with this Court's later ruling in McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990), that a "clear and certain" remedy be provided for a tax scheme ultimately found to be partially unconstitutional?

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COUNTERSTATEMENT OF THE CASE

Petitioners seek yet another writ of certiorari to review the issues of severability and remedy for a partially preempted state tax that this Court previously considered in Exxon v. Hunt, 475 U.S. 355, 376 (1986), and remanded to state court to be determined according to state law. This latest incarnation of petitioners's argument arises not only from their second challenge to the remedy devised by the Supreme Court of New Jersey in Exxon v. Hunt, 109 N.J. 110, 534 A.2d 1 (1987), mandamus denied 485 U.S 975 (1988), but also from the February 22, 1993, decision of the Appellate Division of the Superior Court of New Jersey in Exxon Corp. v. Hunt, 620 A.2d 1068, 262 N.J. Super. 264 (App. Div. 1993), certif. denied 133 N.J. 445 (N.J. 1993). This most recent decision found that this Court's holding in McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990), did not require a modification of the remedy fashioned by the New Jersey Supreme Court, pursuant to the remand of this Court, for expenditures found to have been partially preempted by the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund"), 42 U.S.C. 9614(c) (1983).

1. The State and Federal Statutory Schemes.

New Jersey's Spill Compensation and Control Act, ("Spill Act"), N.J.S.A. 58:10-23.11 et seq. (1992), took effect in 1977, more than three full years before Congress addressed similar cleanup and funding issues in CERCLA. The Spill Act imposed a tax on major petroleum and chemical facilities to generate revenues to be credited to the Spill Fund for use in financing the prevention and cleanup of hazardous discharges within the state. N.J.S.A. 58:10-23.11f, g, h. As adopted, the Spill Act authorized Spill Fund expenditures for several purposes: 1) to finance governmental cleanup of hazardous waste, including oil spills; 2) to reimburse innocent third parties for cleanup costs; 3) to compensate innocent third parties for damage

resulting from oil spills or other discharges of hazardous wastes; 4) to pay personnel and equipment costs; 5) to administer the Spill Fund; and 6) to conduct research.

In December of 1980, CERCLA took effect, imposing a tax on certain petroleum and chemical products to be credited along with appropriations from general revenues to a trust account known as "Superfund." These moneys were made available to finance federal cleanups of hazardous waste sites, although oil spills were beyond the statutory coverage, as was a mandatory state share of at least 10% of remedial costs. 42 U.S.C. §§9601, 9604, 9611. Superfund financing for cleanups was further limited to those purposes designated by the United States Environmental Protection Agency ("USEPA") in the National Contingency Plan ("NCP"), which included the National Priority List ("NPL"), a compilation of the worst sites nationwide. 42 U.S.C. §§9604, 9605, 9611; 40 C.F.R. §300.1 et seq. (1989). As even a quick comparison of CERCLA and Spill Fund's authorized uses shows, there were areas where state coverage exceeded that available from Superfund as well as areas of overlap.

2. This Court's Decision in Exxon v. Hunt.

As originally enacted, CERCLA contained a preemption clause, §114(c), which stated in pertinent part that, "Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter." Congress removed this preemption clause from the statute in the Superfund Amendments and Reauthorization Act ("SARA"), P.L. 99-499, signed into law by the President on October 17, 1986. Based on the original §114(c), however, petitioners instituted litigation in the Tax Court of New Jersey seeking the total preemption of the New Jersey Spill Tax and refunds of all of the taxes

they had paid into the Spill Fund since the effective date of CERCLA. After each of three successive New Jersey courts upheld the Spill Tax, 4 N.J. Tax 294 (1982); 190 N.J. Super. 131, 462 A.2d 193 (App. Div. 1983); 97 N.J. 526, 481 A.2d 271 (1985); petitioners sought and obtained review from this Court.

This Court held that §114(c) of CERCLA preempted in part the New Jersey Spill Act. Exxon Corp. v. Hunt, 475 U.S. at 358. The issues addressed by the Court were the meaning and scope of CERCLA's preemption clause, and the preemptive impact of that statutory construction on the New Jersey Spill Fund. 475 U.S. at 363-364. After recognizing that §114(c) was "not a model of legislative draftsmanship," 475 U.S. at 363, the Court concluded that the meaning of the provision could be ascertained only by reference to the remainder of CERCLA. Id. In scrutinizing the balance of the statute, the Court's primary focus was on categories of expenditure -- those categories covered by CERCLA for which compensation from Superfund was available.

After analyzing CERCLA, this Court concluded that the NCP provided the criteria to determine "what expenses, at which sites, will be eligible for Superfund money." 475 U.S. at 374-375. As noted by the Court, the NCP specified that removal actions, or immediate cleanups, would be financed by Superfund only in emergency situations. 40 C.F.R. §300.65(b). Remedial actions consistent with permanent remedies would be financed only for sites nominated by USEPA to the NPL, the list of the worst sites nationwide. 40 C.F.R. §300.68(a). The Court thus used these regulatory parameters to define the categories of cleanup expenses "which may be compensated" by the Superfund, and which, according to the Court's interpretation of §114(c), could not properly be duplicated as categories of expenditures from special state funds. 475 U.S. at 376. Even these parameters were not all-inclusive

as to the scope of preemption, however, because the Court found that the state share of 10% or more of remedial costs mandated by CERCLA as a prerequisite for Superfund action could not be compensated by Superfund. Consequently, federal preemption under §114(c) did not extend to state fund financing of the state share of remedial costs.

The Court then applied this analysis to the Spill Act, concluding that the purposes of the state enactment were preempted only to the extent that they permitted "expenditures" beyond the state share "for remedial costs for sites on the National Priority List, or for removal costs that are eligible for Superfund compensation under the terms of the NCP...." 475 U.S. at 376 (emphasis added). Notably, this Court did not craft a remedy for this partial preemption, but remanded the case to the New Jersey Supreme Court to decide "the state-law question whether, or to what extent, the non-preempted provisions of the statute are severable from the preempted provisions." Id. The remand thus left the nature of the remedy to the state courts, which is completely consistent with the precedents of this Court that repeatedly recognize the flexibility accorded to state courts to design remedies in the taxing area.

3. The New Jersey Court Proceeding on Remand.

After receiving this mandate, the Supreme Court of New Jersey, in turn, remanded the case to the Tax Court "to develop a record and make such recommended findings and calculations as may be determined to be necessary to implement the mandate of the Supreme Court." Jurisdiction, however, was otherwise retained. (Pet. App. 70a to 71a). On October 24, 1986, the Tax Court submitted its recommendations which addressed pertinent legal issues that needed to be resolved before an accounting of preempted expenditures was performed. (Pet. App. 39a to 69a). Notably, the Tax Court recommended that the

decision of the Supreme Court of the United States be applied retroactively to the dates of the adoption of the NCP and the NPL -- the regulatory "yardsticks" used by this Court to determine those categories of expenditures that "may be compensated" by Superfund. The Tax Court also found as a matter of state law that the preempted purposes of the Spill Act were severable from the remainder of the statute. Specifically, the Tax Court concluded that the non-preempted purposes were identifiable and were "in no way dependent on the excised portions." (Pet. App. 61a). The Tax Court also suggested that, following an accounting to determine all preempted expenditures made by the Spill Fund, the New Jersey Legislature should be given a reasonable period of time in which to reimburse the Fund for the improper expenditures.

The Supreme Court of New Jersey affirmed these recommendations with modification. Notably, that court fully accepted this Court's determination that "the tax levied by the Spill Act was imposed for certain purposes that were preempted by CERCLA, as well as for other purposes not preempted by CERCLA," as the basic premise of its opinion. 109 N.J. at 113. It thereafter recognized that, "the Spill Act was preempted by §114(c) of CERCLA to the extent that the Act authorized expenditures, beyond the mandatory state share, 'for remedial costs for sites on the National Priority List, or for removal costs that are eligible for Superfund compensation under the terms of the NCP.'" 109 N.J. at 117, quoting Exxon Corp. v. Hunt, 475 U.S. at 376. Indeed, the opinion on remand demonstrated that the New Jersey Supreme Court examined this Court's opinion carefully, quoted from it liberally, and viewed the entire remand squarely in light of the conclusions reached by this Court. See, e.g., 109 N.J. 110. (Pet. App. 15a to 38a).

The first issue addressed by the New Jersey Supreme Court was severability which it found to be warranted as

"manifestly consistent with the legislative intent" of the Spill Act. 109 N.J. at 121. The court further found that the Spill Act "makes sense" with or without the preempted purposes, and thus should stand as a matter of state law despite the portions excised by this Court in Exxon Corp. v. Hunt, 475 U.S. at 374-376. Id. In reaching this conclusion, the New Jersey Supreme Court rejected petitioners's claims that severability was inappropriate because all of the statutory objectives had been financed by the same tax rate. Id. at 118.

The New Jersey Supreme Court next addressed the period and scope of preemption, endorsing the Tax Court's recommendation that the adoption of the NCP and NPL marked the critical dates on which preemption should be deemed to commence. Id. at 120. This finding was based explicitly upon this Court's determination that the NCP and NPL furnished the "appropriate test" for determining preemption. Id. at 126, quoting 475 U.S. at 374. Next, the New Jersey Supreme Court established October 17, 1986 -- the date SARA was enacted and §114(c) of CERCLA was repealed -- as the end date of preemption. After establishing these backward-looking parameters, the court remanded the case once again to the Tax Court for an accounting to determine the exact amount of Spill Fund expenditures preempted by CERCLA. Id. at 126-27.

As to remedy, the court endorsed most of the Tax Court's recommendations as responsive to the peculiar circumstances of this case where the Spill Tax was only partially invalidated, and even that partial invalidation was only for a limited time. Id. at 128. After analyzing the projected needs of the Spill Fund for non-preempted uses, recent legislative amendments to the Spill Act increasing the Fund's tax base, and the congressional repeal of §114(c), the court concluded that, "In our view, reimbursement of the Spill Fund from non-Spill Act revenues vindicates the Spill Fund's payment of preempted expenses in a manner

most consistent with the objectives of Congress and the Legislature." Id.at 132. The New Jersey Supreme Court then remanded the case back to the Tax Court for further proceedings. Id.

4. This Petition.

As a result of that decision, these petitioners sought a writ of mandamus from this Court to the Supreme Court of New Jersey for allegedly violating this Court's mandate in Exxon v. Hunt, 475 U.S. 355 (1986), by denying them a refund of the preempted state taxes. That mandamus petition was denied on March 28, 1988. 485 U.S. 975. Petitioners then moved for summary judgment before the Tax Court seeking an order mandating a full refund of Spill Fund taxes attributable to preempted purposes, contending that this Court's recent decision in McKesson required a modification of the remedy fashioned by the New Jersey Supreme Court. The Tax Court denied this motion based on the "law of the case" doctrine. (Pet. App. 13a). The Appellate Division of the Superior Court of New Jersey affirmed on February 22, 1993, addressing the applicability of McKesson on the merits, however, and finding McKesson not to require anything further than the remedy already provided by the Supreme Court of New Jersey. Exxon v. Hunt, supra, 262 N.J. Super. at 268-70 (Pet. App. 5a to 7a). Petitioners now seek review from this Court for a third time.[1]

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[1] This petition actually represents Exxon's fourth request for review by this Court. See also, Exxon v. Hunt, 11 ELR 20,886 (D.N.J. 1981)(finding the proper forum for Exxon to bring its claim in the first instance to be state court), aff'd 683 F.2d 69 (3d Cir. 1982), cert. denied 459 U.S. 1104 (1983).

REASONS FOR DENYING THIS PETITION

This petition for a writ of certiorari should be denied because the Supreme Court of New Jersey, on remand, fully carried out the mandate of this Court in Exxon v. Hunt and, furthermore, crafted a remedy that is in full accord with this Court's subsequent ruling in McKesson. The precedents of this Court clearly hold that the remedy for an unlawful tax is governed by state law and has historically been left to the state courts to decide as long as constitutional requirements -- met here -- are satisfied. Those principles would be promoted by denying this petition. In addition, this matter involves a narrow issue, affecting few, which is most "unlikely to recur," because the provision of CERCLA preempting certain state actions was repealed by Congress in 1986. After thirteen years of litigation,[2] it is time for this matter to come to rest.

I. The Remedy Ordered By The New Jersey Supreme Court Is Consistent With The Requirements Established By This Court In McKesson.

The Appellate Division below, despite petitioners's contentions to the contrary, did not "ignore" McKesson but thoroughly addressed it and found that "[t]he logic of McKesson as applied to this case is that if a workable means for curing the pre-emption impairment of the Spill Fund tax short of a refund is employed, then the plaintiffs' constitutional right to an effective remedy will not have been violated." 262 N.J. Super. at 268. (Pet. App. 5a). Since just such a "workable means" was ordered by the

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[2] See 4 N.J. Tax 294 (1982); 190 N.J. Super. 131, 462 A.2d 193 (App. Div. 1983); 97 N.J. 526, 481 A.2d 271 (1985); 475 U.S. 355 (1986); _ N.J. Tax _ (1986); 109 N.J. 110 (1987); 485 U.S. 975 (1988); _ N.J. Tax _ (1991)(Pet. App. 10a); 620 A.2d 1068, 262 N.J. Super. 264 (N.J. Super. A.D. 1993) certif. denied 133 N.J. 445 (N.J. 1993).

New Jersey Supreme Court and implemented by the New Jersey Legislature when it reimbursed the Spill Fund for over $8 million in preempted expenditures, the mandate of McKesson for a "clear and certain" remedy was met here. Moreover, in framing their "question presented" and throughout their brief, petitioners have failed to recognize as well that the Spill Fund tax was only partially preempted, that the New Jersey tax itself was not beyond the power of the state to impose, that the state and federal legislation were not congruent but partially overlapped, that the petroleum and chemical industries were never immune from this tax, that the tax was perfectly valid if used for nonpreempted items and that states were never preempted by CERCLA from using general revenues to finance Superfund-type activities. Given the circumstances of this case, therefore, McKesson was properly applied below and further review by this Court is unwarranted.

A. McKesson Does Not Require A Refund Where As Here The Tax Is Partially Valid.

The decision below noted that McKesson emphasized the choice of options available to the state in remedying a discriminatory tax where, although the tax itself represents a valid exercise of state power, either its incidence or the manner in which it is administered results in disfavored treatment for certain persons and entities. 262 N.J.Super. at 268. (Pet. App. 5a). The Appellate Division found the Spill Fund tax similarly to be a valid exercise of state power that had been found to be overly broad, "subsuming objectives which were, for a time, preempted by federal law," and noted that the "United States Supreme Court held in this case that CERCLA expressly preempted the Spill Fund from being used" (emphasis in original) for parts of two of its six purposes except to the extent of providing the 10% state share of remedial costs. Id. at 269 (citations omitted). (Pet. App. 6a). The court also noted that the other four purposes of the Spill Fund were expressly held

by this Court not to have been preempted and that the taxes paid by the petitioners during the period of preemption were "presumptively valid as levies to fund those Spill Fund objectives that were determined not to have been preempted by federal law." Id. at 269 (citations omitted).

The remedy crafted by the court below authorized refunds to petitioners only if the New Jersey Legislature failed to reimburse the State Spill Fund, the recipient of the taxes paid by petitioners under the Spill Act, for all preempted expenditures made by the Spill Fund within six months of a final accounting of those preempted expenditures. The New Jersey Legislature reimbursed the Spill Fund in the amount stipulated to by the parties, $8,142,094, within the allotted time period. (Pet. App. 8a). Petitioners thus received no refunds, but a retrospective remedy was provided.

Thus, the petitioners have no enforceable claim to a refund as long as the Spill Fund revenues expended for preempted purposes during the limited period of preemption were returned to the Fund from general revenues during the time allotted. "This conclusion is of a piece with the United States Supreme Court's rationale in McKesson." Id. at 269-70. (Pet. App. 6a-7a). Since the New Jersey courts had already determined to apply a "clear and certain" remedy, McKesson requires nothing further. Nor is there anything novel about McKesson's treatment of a partially invalid tax that would require this Court to review the decision of the court below. For this Court stated unequivocally in McKesson that "[o]ur approach today ... is rooted firmly in precedent dating back to at least early this century." 496 U.S. at 32-33. And since the New Jersey Supreme Court's crafting of a remedy satisfies that line of precedent, including McKesson, further review is unwarranted.

Contrary to petitioners's characterization, statutory construction, not tax refunds, has been the primary focus of this litigation. This Court never contemplated a tax refund in the unique circumstances of this partial preemption case and made no reference to the question of refunds in its opinion,[3] 475 U.S. 355-77, but left the State with the duty, as is its custom after invalidating a state tax scheme, "of crafting appropriate relief." McKesson, 496 U.S. at 32, n. 16. See also American Trucking Associations, Inc. v. Smith, 496 U.S. 167, 176 (1990) ("When we have held state taxes unconstitutional in the past it has been our practice to abstain from deciding the remedial effects of such a holding ... and have entrusted state courts with the initial duty of determining appropriate relief."); Harper v. Virginia Dept. of Taxation, 113 S. Ct. 2510, 2519 (1993) (finding state must apply remedy retroactively to the tax years at issue in petitioners's refund action, and thereby reversing judgment below, but refraining from entering judgment for petitioners "because federal law does not necessarily entitle them to a refund."); James B. Beam Distilling Co., v. Georgia, 111 S. Ct. 2439 (1991) (finding that once a rule is to apply retroactively "the remedial inquiry is one governed by state law."). The Spill Act Tax preempted here is analogous to the tax found to violate the Commerce Clause in McKesson in that it was only partially preempted and it was well within the State's power to apply; the tax was merely overbroad and needed adjustment. Thus, the discussion of the flexibility afforded to state courts and state governments to remedy state taxes in McKesson is equally applicable here.

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[3]Justice Stevens did, however, discuss refunds in his dissent, but he believed that the "judgment of the Supreme Court of New Jersey should be affirmed" in its entirety. 475 U.S. at 386, 376. He also wrote, "If the New Jersey courts were to hold that the proscribed purposes were severable from the permissible ones, appellants would be entitled to no refund." Id. at 385, n. 10.

Petitioners erroneously claim that the remedy crafted by the New Jersey Supreme Court according to the mandate of this Court is inadequate because this Court's decision in McKesson requires a refund of all tax money that was collected pursuant to the Spill Act. (Pet. Brief at 15). McKesson, far from requiring a tax refund, clearly articulates the flexibility available to the state in crafting a remedy for an invalid tax. 496 U.S. at 40. Much as the New Jersey Supreme Court did here, this Court suggested in McKesson that a viable alternative to refunds to the taxpayers would be a retroactive adjustment of the tax base that would eliminate the effects of the illegal portions of the tax. Specifically, McKesson suggested that the illegal portions of the tax could be rectified by "a partial retroactive assessment of tax increases on favored competitors, so long as the resultant tax actually assessed during the contested tax period reflects a scheme that does not discriminate against interstate commerce..." Id.

This Court suggested possible remedies that would least impair state finances while still satisfying the demands of due process, but made clear that the choice of remedy was to be left to the state to decide. This could be accomplished, it suggested, by taking remedial action in order to erase the effects of the invalid portions of the tax. Specifically, the Court instructed Florida that it could achieve compliance with Due Process if it were to:

> reformulate and enforce the Liquor Tax during the contested tax period in any way that treats petitioner and its competitors in a manner consistent with the dictates of the Commerce Clause. Having done so, the State may retain the tax appropriately levied upon petitioner pursuant to this reformulated scheme because this retention would deprive

> petitioner of its property pursuant to a tax scheme that is valid under the Commerce Clause. [Id. at 40].

Thus, McKesson does not necessarily require a refund to the taxpayer, as petitioners assert, but allows a post-deprivation remedy designed to eradicate the effects of the illegal tax by retroactively reformulating it, with the State retaining the revenue. See Id. at 40-41.

Indeed, the remedy suggested by McKesson as an adequate means to satisfy the requirements of due process is remarkably similar to the remedy mandated here. McKesson required that the taxpayer assessed in that case under an unconstitutional tax must receive some form of retrospective relief, not just prospective relief -- the same conclusion that the Tax Court of New Jersey had reached three years earlier, and the conclusion that was endorsed by the New Jersey Supreme Court. See Exxon v. Hunt, 109 N.J. at 113. However, nowhere in its opinion in McKesson did this Court say that a refund was the only kind of retrospective relief available to the State.

A review of this Court's subsequent cases citing McKesson illustrates that McKesson does not require a refund. On the contrary, it has been cited for its recognition of the flexibility accorded to states to craft a remedy for an improper state tax, according to state law, as long as it complies with minimum federal standards. See Harper, supra, 113 S.Ct. at 2519 (citing McKesson for the proposition that "a State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination."); American Trucking, supra, 496 U.S. at 176 ("While the relief provided by the State [for remedying an unconstitutional tax] must be in accord with federal constitutional requirements, see McKesson (citations omitted), we have entrusted state courts with the initial duty of determining appropriate relief.").

McKesson made clear that as long as due process is guaranteed the remedy for a preempted state tax is a matter of state law.

Although its decision predated McKesson, the relief given to petitioners by the New Jersey Supreme Court here is at least as extensive as the relief deemed sufficient by this Court in McKesson. The parallels between the remedy created by the New Jersey Supreme Court and the remedy described by this Court in McKesson are obvious. Like this Court, the New Jersey Supreme Court started with the proposition that a taxpayer who pays a partially invalid tax is entitled to meaningful backward-looking relief. See Exxon Corp. v. Hunt, supra, 109 N.J. at 128. Here, as this Court suggested as one remedy in McKesson, the effects of a partially invalid tax were corrected through a retroactive adjustment to the Spill Fund. McKesson, supra, 496 at 31, 40; Exxon Corp v. Hunt, supra, 109 N.J. at 129-132.

Petitioners, however, artificially distinguish McKesson by arguing that such alternatives to a total refund cannot be applied to a tax that is partially preempted, but only to a tax that is partially invalid because it is "discriminatory." Since some of the uses of the tax here were invalid because they were preempted, rather than because they violated the restrictions against State regulation of interstate commerce, petitioners conclude that McKesson gives them an absolute right to a refund of the entire amount paid. Petitioners offer no rationale for such a distinction, and, indeed, there is no legal basis for their contention that the valid portions of a tax that has some unconstitutional provisions can be rescued through a retroactive adjustment only when the tax discriminates against the right to engage in interstate commerce.

The primary significance of the fact that the tax reviewed in McKesson was partially invalid because it was

discriminatory was that there remained a portion of the tax that was validly collected, and which therefore was within the power of the state to impose. Id. at 40. The Court went on to distinguish this partial invalidation from other cases in which the tax "was beyond the State's power to impose," or was invalid "because the taxpayers were absolutely immune from the tax..." Id. at 39. In such instances, where the state totally lacked the power to impose such a tax, "no corrective action by the State could cure the invalidity of the tax during the contested tax period." Id. Thus, it is clear that, while a totally unconstitutional or ultra vires tax would have to be refunded because the defects in its levy and collection could never be corrected, McKesson still gives the state the opportunity to correct a defect by retroactively restructuring a partially valid tax by eliminating the effects of the invalid portions.

It was not beyond the power of the State of New Jersey to impose a tax on the petroleum and chemical industries pursuant to the Spill Act. CERCLA did not preempt state taxes on the petroleum and chemical industries, nor dictate that these industries were altogether immune from any taxation. CERCLA merely worked a partial preemption of two of the six uses of the Spill Fund. Effective relief was crafted by the New Jersey Tax Court and the Supreme Court of New Jersey: legislative action refunding money used for preempted expenditures to the Spill Fund. The conclusion is inescapable that the decision of the New Jersey Supreme Court granted a "clear and certain" remedy constituting "meaningful backward-looking relief," 496 U.S. at 31-32, that is consistent with McKesson.

B. The Equitable Discretion Language of McKesson Is Relevant Only To Retrospective Relief And the Petitioners Have Already Been Afforded That Relief.

Petitioners misconstrue McKesson further, arguing that the New Jersey courts have "ignored" this Court's ruling which precludes the exercise of equitable discretion where a preempted tax is involved. This Court made no such ruling, but found only that neither of the two equitable considerations cited by the Florida Supreme Court for providing petitioners with prospective relief were sufficient to override the constitutional requirement in that case to provide retrospective relief. 496 U.S. at 44. But the Court also found that the state may weigh such equities when choosing "between the various avenues of relief open to it." Id. at 51. In Beam v. Georgia, supra, a case applying retroactivity to a similar situation, this Court wrote that "nothing we say here precludes consideration of individual equities when deciding remedial issues in particular cases." 111 S.Ct. at 2448. Thus, McKesson cannot be interpreted, as Exxon insists, to preclude courts from considering the equities when selecting the remedy for the violation of a constitutional rule. In discussing McKesson, in Beam v. Georgia, this Court explained that McKesson cannot be read as Exxon insists:

> Nothing we say here deprives respondent of his opportunity to raise procedural bars to recovery under state law or demonstrate reliance interests entitled to consideration in determining the nature of the remedy that must be provided, a matter with which McKesson did not deal. [Id.]

This discussion of equities may be entirely irrelevant, however, because the equitable considerations language of McKesson goes only to the issue of retrospective relief, and

the New Jersey Supreme Court provided retrospective relief when it formulated the remedy in this case.

II. The Determinations Of The Supreme Court Of New Jersey On Remand Are Completely Consistent With The Mandate Of This Court.

Petitioners allege that "New Jersey should be ordered in accordance with the mandate of Hunt to refund all Spill Fund taxes paid by petitioners." (Pet. Brief at 15). Despite petitioners's protestations to the contrary, this Court did not mandate a refund in Hunt nor was such a remedy ever contemplated by this Court. As American Trucking, McKesson, Harper, and Beam hold repeatedly, the remedy for an unlawful tax is not necessarily a refund, nor is it traditionally decided by this Court; the remedy for this partially preempted state tax is governed by state law.

Equally erroneous is petitioners's allegation that the crucial premise of the New Jersey courts on remand was that "Hunt held that Section 114(c) preempted only expenditures from the fund for an impermissible purpose and not the imposition of the tax." (Pet. Brief at 13). The remedial parameters established by the Supreme Court of New Jersey were based upon and derived from the judgment of this Court in Exxon Corp. v. Hunt. The very starting point of analysis was the determination by this Court that CERCLA partially preempted two of the six uses to which the entire Spill Act Tax could be put. Although this Court held that the actual expenditures made by the Spill Fund were irrelevant for determining what §114(c) meant, nothing in the opinion of this Court supports petitioners's position that expenditures are irrelevant for the purpose of remedy. In fact, the finding of partial preemption, tailored as it was to sites on the NPL and to emergency response actions covered by the NCP, actually

invites concentration on preempted expenditures as the most reasonable and practical way to establish an equitable remedy. The Supreme Court of New Jersey thus reasonably decided that the monetary amount of any remedy should be equal to the amount of expenditures actually made for preempted uses. As to the period of preemption, here too the Supreme Court of New Jersey relied upon this Court's ruling that the proper test of Superfund eligibility was the NCP, including the NPL. It consequently used the promulgation dates of those regulations as the starting dates for calculating all preempted expenditures. Such an approach is completely consistent with this Court's finding of partial preemption, and also flows from the decision of the Supreme Court of New Jersey that the non-preempted uses of the Spill Act were sufficient to support the original tax rate.

Petitioners assert, nevertheless, that the entire tax must fall because it contains a single tax rate which cannot be severed. Had this been this Court's view, presumably it would have said so, thereby concluding the matter without the necessity of a remand. Plainly, this Court's holding of partial preemption, focusing on expenditures for preempted purposes rather than upon tax collections, amply justifies looking beyond the tax rate to expenditures by the Spill Fund.

The remedy devised by the Supreme Court of New Jersey, giving the New Jersey Legislature the opportunity to reimburse the Spill Fund from general revenues for all expenditures made in violation of CERCLA's preemption clause, takes full account of the partial preemption found by this Court and redresses any injury caused by the improper expenditure of Spill Fund moneys.

CONCLUSION

For all of the foregoing reasons, the State of New Jersey requests that this Court deny the petition for a writ of certiorari.

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No. 93-288

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

EXXON CORPORATION, THE BF GOODRICH COMPANY, UNION CARBIDE CORPORATION, AND MONSANTO COMPANY,
Petitioners,

v.

SUSAN B. BOYLE, ADMINISTRATOR OF THE NEW JERSEY SPILL COMPENSATION FUND, et al.,
Respondents.

On Petition For A Writ of Certiorari To The Appellate Division Of The New Jersey Superior Court

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

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1. The petitioners have shown that the New Jersey courts disregarded this Court's decision and mandate in *Exxon Corp.* v. *Hunt*, 475 U.S. 355 (1986). Respondents ("New Jersey" or "the State") make but a half-hearted effort to meet that showing (Opp. 17-18), and instead seek to justify the decisions below by invoking this Court's decision in *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990) (Opp. 8-17), and by contending that *Hunt* involves a narrow legal question that is unlikely to recur (*id.* at 8).

These tactics cannot obscure the significance of this case. At issue here is the integrity of the Supremacy Clause and this Court's decision in *Hunt*. *See Yates* v. *Aiken*, 484 U.S. 211, 214 (1988) (granting certiorari because of State court's non-compliance with Supreme Court mandate); *Sumner* v. *Mata*, 455 U.S. 591, 596-98 (1982) (same).

2. To the extent that New Jersey confronts *Hunt* (Opp. 17-18), it takes the same erroneous position that it has consistently taken since the enactment of CERCLA: It refuses to recognize the holding of *Hunt* that Section 114(c) pre-empted certain state taxes, and instead argues that the statute pre-empts only certain expenditures from the New Jersey Spill Fund.[1/]

In *Hunt*, this Court agreed with petitioners that "the New Jersey courts [had] violated the plain meaning of" Section 114(c), which is clear on its face: "[N]o person may be required to contribute to any fund" whose purpose is to pay compensation for costs and claims covered by CERCLA. The Court in *Hunt* thus held that the statute pre-empted taxes, not expenditures.[2/] The State itself recognized this crucial difference in prior filings,[3/] and it concedes the point now:

[1/] The most flagrant example of the State's misreading of *Hunt* is found at Opp. 18, where New Jersey asserts that "this Court's holding of partial preemption [in *Hunt*] focus[ed] on expenditures for preempted purposes rather than upon tax collections . . . ." *See also id.* at 9 ("the tax was perfectly valid if used for nonpreempted items"); *id.* at 15 ("CERCLA merely worked a partial preemption of two of the six *uses* of the Spill Fund"); *id.* at 18 (the lower courts' remedy "redresses any injury caused by the improper expenditure of Spill Fund monies").

[2/] *See* 475 U.S. at 361 (Section 114(c) forbids "the States to impose taxes to finance certain types of funds"); *id.* at 362 (question is whether Section 114(c) "forbids state taxation of the type the Spill Act imposes").

[3/] *See* Pet. 14 n.17 referring to an earlier New Jersey brief in opposition.

"[T]his Court held [in *Hunt*] that the actual expenditures made by the Spill Fund were irrelevant for determining what §114(c) meant . . . ." (Opp. 17).[4/]

Drawing upon the plain meaning of Section 114(c), this Court held that the tax enacted by the Spill Act could not be saved from pre-emption by arguments based upon Spill Fund expenditures:

> "New Jersey argues, finally, that after the enactment of CERCLA, . . . all Spill Fund expenditures for [CERCLA purposes] have been for non-Superfund eligible sites, and therefore are for non-pre-empted purposes. *To the extent that the Spill Act permits taxation to support pre-empted expenditures, however, it cannot stand.*"

475 U.S. at 376 (emphasis added).

Based upon this interpretation of Section 114(c), the Court remanded the case for the sole purpose of determining

> "the state-law question whether, or to what extent, the non-pre-empted provisions of the statute are severable from the pre-empted provisions."

Id. In so doing, the Court cited *Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 196-97 (1983). *Eagerton*, in turn, had remanded a case, successfully challenging a state tax scheme as partially pre-empted by federal law insofar as it applied to

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[4/] The State attempts to qualify this concession by arguing that "nothing in the opinion of this Court [in *Hunt*] supports petitioners's [sic] position that expenditures [made by the Fund] are irrelevant for the purpose of remedy." Opp. 17. But the silence of *Hunt* on this point is hardly surprising, since the State did not argue that it could fashion a remedy based upon expenditures from the Fund. More fundamentally, the *Hunt* remand order left no room for the New Jersey courts to deny petitioners a tax refund based on a replenishment of the Fund. *See infra* 3-4.

sales of gas in interstate commerce, "to determine whether the partial invalidity" of a portion of the tax "entitles appellants to a refund of some or all of the taxes paid under protest." *Id.* at 197. Thus, the sole task contemplated in *Hunt* was for the State to determine, as a matter of New Jersey law, whether the challenged tax could be severed into pre-empted and non-pre-empted components, which would require a partial refund to petitioners, or whether it could not be so severed, which would require a full refund.

The New Jersey Tax Court *agreed* with petitioners that "the Spill Act contains a single tax that cannot be apportioned." App. 57a.; *see also* App. 59a. It conceded that if this Court in *Hunt* held (as it did) that "it was the *collection* of the tax that was improper," petitioners were entitled to a full refund of all of the taxes that they had paid. App. 65a. The New Jersey Supreme Court did not disturb this analysis,[5/] and the State similarly does not now challenge this interpretation of state law.[6/]

Thus, the state courts have answered the only question placed before them by the mandate of *Hunt*: The pre-empted tax cannot be severed. Petitioners are, therefore, entitled to a full refund of all the taxes that they paid while Section 114(c) was in effect. The state courts' denial of such relief to petitioners rests upon a blatant misreading of *Hunt*.

3. Respondents seek to justify denial of any relief to petitioners by invoking the "flexibility" (Opp. Br. 12) and "choice of options" (Opp. Br. 9) that they argue *McKesson*

5/ *See* Pet. 12 & n.14.

6/ To be sure, New Jersey notes that "[t]he Tax Court also found as a matter of state law that the preempted purposes of the Spill Act were severable from the remainder of the statute." Opp. 5, citing App. 61a. However, the Tax Court's opinion on this point, like the opinion of the New Jersey Supreme Court (App. 21a-26a), did not focus upon the severability of the pre-empted tax. Instead, it held that "the remaining [non-pre-empted] *purposes*" for which monies can be spent from the Spill Fund "are in no way dependent on the excised portions." App. 61a (emphasis added).

grants state courts in crafting a remedy for an unconstitutional tax.

This Court need not even consider the proper application of *McKesson*, because New Jersey's arguments in reliance on that case are undermined by the fundamental error discussed above: The "discretion" exercised by the New Jersey courts to deny petitioners any remedy was based on a clear misreading of *Hunt* and its interpretation of Section 114(c) as preempting expenditures, rather than taxes. Only such a distortion of this Court's holding could justify a "remedy" that makes the Spill Fund whole, but provides no relief for petitioners who have paid pre-empted taxes.

In any event, the "flexibility" afforded by *McKesson* is limited to impermissibly discriminatory taxes, 496 U.S. at 39-40;[7] all of the cases cited by New Jersey which recognized such remedial flexibility in state courts (Opp. Br. 11) have involved such taxes.[8] *McKesson* made clear, however, that for taxes which are "beyond the State's power to impose," a "State [has] no choice but to 'undo' the unlawful deprivation by refunding the tax previously paid under duress." 496 U.S. at 39.

The State's efforts to distinguish *McKesson* on this point based on the argument that the tax was only partially pre-empted fails for two reasons. First, it is inconsistent with the very decisions by the New Jersey courts in this case that the State defends. New Jersey contends that "*McKesson* still gives the State the opportunity to correct a defect by retroactively restructuring a *partially* valid tax by eliminating

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[7] Such flexibility is appropriate because the invalid element of the tax — discrimination — can be remedied through either a tax refund to out-of-state parties or a retroactive tax increase on in-state parties. By contrast, the taxes declared pre-empted by *Hunt* were not within the State's power to exact. Accordingly, the invalid element — the illegal tax itself — can only be redressed by a refund.

[8] *Harper* v. *Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993); *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991); *American Trucking Ass'n, Inc.* v. *Smith*, 496 U.S. 167 (1990).

the effects of the invalid portions." (Opp. 15, emphasis added). Here, of course, the New Jersey courts did not "retroactively restructur[e]" the pre-empted tax "by eliminating the effects of the invalid portions" of the tax. Instead, they held that the tax could not be so severed and restructured, and they provided no remedy to the taxpayer for the invalid portion of the tax.

Second, New Jersey's argument that the *per se* refund rule of *McKesson* applies only to "totally unconstitutional" taxes (Opp. 15) ignores *McKesson*'s reliance on *Atchison, T.&S.F.R. Co.* v. *O'Connor*, 223 U.S. 280 (1912), as an example of a tax "beyond the State's power to impose," which must be refunded. 496 U.S. at 39. The tax in *O'Connor* was only partially invalid, because it was not apportioned between property within the taxing state and out-of-state property. Nonetheless, the Court concluded that the taxpayer was "entitled to a refund of the portion of the tax imposed on out-of-state activity." *McKesson*, 496 U.S. at 32; *See also Eagerton*, 462 U.S. at 196-97 (contemplating refund for partially pre-empted tax).

Finally, New Jersey's argument that replenishment of the Spill Fund is an appropriate remedy under *McKesson* (Opp. Br. 15) ignores the fact that petitioners almost certainly would have lacked standing to challenge the New Jersey Spill Act, if they had complained only of improper expenditures and had sought reimbursement of the Fund for those expenditures. *See Doremus* v. *Board of Educ.*, 342 U.S. 429, 433-34 (1952); *Frothingham* v. *Massachusetts*, 262 U.S. 447 (1923). Petitioners had standing in this Court because they argued that they had been compelled to pay an unlawful tax and because they sought a tax refund to redress that injury. *See Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976).

4. The remedy of replenishing the New Jersey Spill Fund could not possibly be warranted unless expenditures had been preempted by Section 114(c) of CERCLA. *Hunt* rejected that reading of the statute. It was the exaction of the tax by New Jersey that was pre-empted, and the only "meaningful, backward-looking relief" that redresses the harm suffered by

the petitioners is a refund of the taxes that they paid while Section 114(c) was in effect.

CONCLUSION

The petition should be granted, and summary disposition is appropriate.

Respectfully submitted,

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